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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 242.

THE CITY OF MANCHESTER, VIRGINIA, PLAINTIFF IN ERROR,

vs.

O. A. ERICSSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 13, 1879.

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1 In the circuit court of the United States for the fourth judicial circuit and eastern district of Virginia.

O. A. ERICSSON
vs.
THE CITY OF MANCHESTER. } Trespass on the case.

Be it remembered that on the third day of June, A. D. 1878, came the plaintiff, by his attorney, and sued out of the clerk's office of the circuit court of the United States for the eastern district of Virginia a summons against the defendant, which, with the return thereon, is as follows:

Summons.

Circuit court of the United States of America, eastern district of Virginia, ss.

The President of the United States of America to the marshal of the eastern district of Virginia, greeting:

We command you that you summon The City of Manchester, a corporation incorporated by the laws of the State of Virginia, a citizen of the State of Virginia, if it shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules to be holden at the said clerk's office, in the custom-house in the city of Richmond, in the district
2 aforesaid, on the first Monday of July next, to answer unto O. A. Ericsson, a citizen of the Kingdom of Sweden and Norway, in a plea of trespass on the case to his damage, as he alleges, of twenty-five thousand dollars, and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 3d day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102d year.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Return.

Executed this 5th day of June, 1878, by delivering to James A. Clarke, mayor of the city of Manchester, the within-named defendant, in person, a true copy of this writ.

C. P. RAMSDELL,
U. S. Marshal.

And at another day, to wit, at rules held in the clerk's office of said circuit court on the first Monday of July, 1878, the plaintiff, by his attorney, filed the following declaration against the defendant, to wit:

Declaration.

In the circuit court of the United States for the eastern district of Virginia.

O. A. Ericsson, a citizen of the Kingdom of Sweden and Nor-
3 way, complains of The City of Manchester, a corporation incor-

porated by the laws of the State of Virginia, a citizen of Virginia, who has been duly summoned, &c., of a plea on the case, for that whereas the defendant, before and on the first day of April, 1878, was a municipal corporation chartered by the legislature of Virginia, clothed with the powers incident to its charter as a city, and subject to all the duties and liabilities incident to such charter, and thereby it became and was, among other duties of said defendant, the duty of the defendant to keep in good, safe, secure, and fit for the use of the public generally, and the plaintiff in particular, all of its public streets and sidewalks which it allowed to remain open to the use of the public, and to keep sound, safe, secure, and serviceable for public use and travel all its pavements, footways, and sidewalks, and particularly the sidewalk or pavement on the easternmost or lower side of Seventh street, at the point where said Seventh street crosses by means of an arch the railway of the Richmond and Danville Railroad Company, at which said point there now is, and for a long time before and on the day and year aforesaid there was, a certain parapet wall which was and is an inadequate, insufficient, and unsafe protection for travellers
4 passing on the said highway, of all which the said defendant, long before the day and year aforesaid, had notice. Yet the said defendant, well knowing the premises, although bound as aforesaid to keep said highway in safe and secure condition and repair for the use of the public and the plaintiff, on the day and year aforesaid, disregarding its duties in the premises, did not so keep the same in a safe and secure condition and in repair, but on the contrary willfully, negligently, wrongfully, and unjustly permitted the said highway to be and continue in an unsafe and insecure condition, and the same was then and there so badly, insufficiently, and defectively protected that, by reason of the premises, and for want of a proper railing, wall, or other protection upon the said highway or street along said street or highway where it crosses by means of an arch the roadway of the Richmond and Danville Railroad Company, the plaintiff, O. A. Ericsson, who was then passing in and along said highway, then and there necessarily slipped and fell from and off said highway and fell a great distance, whereby the right leg of the plaintiff was broken, his spinal cord injured, and serious and permanent internal injuries received by him, and the plaintiff became and was sick,
5 sore, lame, and diseased, and so remained from thence hitherto; during all which time he thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful business, and was also, by means of the premises, and forced, obliged to lay out, pay, and expend a large sum of money, to wit, the sum of $500.00 in and about the endeavoring to get healed and cured of said wounds, injuries, and sickness and disorder. And the plaintiff avers that the said highway had been in an unsafe, insecure, and improper condition for many years prior to the day and year aforesaid, and that the defendant had notice of the same, and that the said highway was insufficiently protected and dangerous; but the defendant, although well informed thereof, and having had notice thereof for a long time, willfully and negligently permitted the same to remain unprotected, unsafe, and dangerous until the occurrence of the accident aforesaid at the day aforesaid.

And whereas the defendant before and on the first day of April, 1878, was a municipal corporation chartered by the legislature of Virginia, clothed with the powers incident to its charter as a city, and subject to all the duties and liabilities incident to such charter,

6 and thereby it became and was among other duties of said defendant the duty of the defendant to keep in good, safe, secure and fit for the use of the public generally, and for the use of the plaintiff, all of its public streets, sidewalks and highways, which it allowed to remain open to the use of the public, and to keep safe, secure, and serviceable for public use and travel all its streets, pavements, footways, sidewalks and highways, and particularly the sidewalk, footway, or pavement on the eastern or that side of Seventh street nearer James River, at the point nearer to said city where said Seventh street crosses by means of an arch the roadway of the Richmond and Danville Railroad Company, at which point there now is, and for a long time before, and on the day and year aforesaid, there was a certain parapet wall, running along parallel with said street, which was and is an inadequate, insufficient and unsafe protection for travellers passing on the said highway from accidentally stumbling or falling, or unintentionally and unknowingly stepping from said highway over into the gully, ditch, or declivity, which is several feet below said highway, and along which runs the roadbed of said railroad, of all which the said defendant long before the day and year aforesaid had notice. Yet the said de-

7 fendant, well knowing the premises, although bound as aforesaid to keep said highway in safe and secure condition and repair for the use of the public and the plaintiff, on the day and year aforesaid, disregarding its duty in the premises, did not so keep the same in a safe and secure condition, and in repair, but, on the contrary, willfully, negligently, wrongfully and unjustly permitted the said highway to be and continue for a long time in an unsafe and insecure condition, and the same was then and there so badly, insufficiently, and defectively protected that, by means of the premises, and for the want of a proper railing, wall, or other protection at or upon the said street or highway, along that part of said street or highway where it crosses by means of an arch the roadway of the Richmond and Danville Railroad Company, that the plaintiff, O. A. Eriesson, who was on said day passing in and along said highway or street, then and there unintentionally and unknowingly did slip or fall a great distance into the said gully, ditch, or declivity aforementioned, whereby the right leg of the plaintiff was broken, and many other painful and dangerous bruises, jars, and injuries were received by said plaintiff, and the plaintiff became and was sick, sore, lame, and diseased, and so remained from thence hitherto, during all which time he thereby suffered and underwent

8 great pain, and was prevented from attending to and transacting his necessary and lawful business, and was also, by means of the premises forced and obliged to lay out, pay, and expend, and did pay, lay out, and expend a large sum of money, to wit, the sum of $500.00 in and about the endeavoring to be healed and cured of said wounds, injuries, sickness and disorder.

Wherefore, by reason of said premises, the plaintiff says that he was and is injured, and has sustained great damages, to wit, twenty-five thousand dollars, at Manchester, to wit, and therefore he sues, &c.

MEREDITH & COCKE,
G. K. MACON, *P. Q.*

And the defendant not appearing, on the motion of the plaintiff, by his attorney, it was ordered that judgment be entered in his behalf against said defendant for the damages claimed in the declaration, unless said defendant shall appear and plead to issue at the next rules.

At which day, to wit, at rules held in the clerk's office of the said circuit court, on the first Monday of August, 1878, the defendant still failing to appear, on the motion of the plaintiff, by his attorney, it was ordered that the last order made against him in this cause, be
9 confirmed; and that the plaintiff's damages be ascertained by a jury at the next term.

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on Friday, the 11th day of October, 1878.

This day came the parties by counsel, and the defendant demurred generally to the plaintiff's declaration and to each count thereof, in which demurrer, the plaintiff joined. Thereupon the defendant filed the plea of not guilty, to which the plaintiff replied generally, and a special plea to which the plaintiff objected, leave being reserved to it hereafter to file additional pleas.

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held as aforesaid on the 20th day of February, 1879.

This day came again the parties, by their attorneys, and the court having maturely considered of its judgment to be rendered upon the demurrer and special plea heretofore filed herein by the defendant, doth overrule the said demurrer and reject the said special plea. Thereupon came a jury, to wit: Thos. W. Doswell, James Cochran, H. B. Masters, J. A. Chisholm, C. F. Johnston, W. H. Timberlake, Eugene
10 Brown, C. C. Delarne, Clinton Southworth, J. W. Cox, S. B. Ragland, and George Schoen, who having been duly selected and sworn to try the issue joined, and having partly heard the evidence, were adjourned until to-morrow morning at eleven o'clock.

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held as aforesaid, on the 21st day of February, 1879.

This day came again the parties by their attorneys and the jury sworn on yesterday to try the issue joined herein, having fully heard the evidence and arguments of counsel, were adjourned until to-morrow morning at ten o'clock.

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held as aforesaid, on the 22d day of February, 1879.

This day came again the parties by their attorneys, and the jury heretofore sworn herein having retired to their room to consult of their verdict after some time returned into court, and upon their oath do say, "We, the jury, find for the plaintiff and assess his damages at five thousand five hundred dollars." Thereupon the defendant moved the court that said verdict be set aside and that a new trial be granted; which motion the court ordered to be docketed and continued to Monday, the 31st day of March, next.

11 And now, at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on Thursday, the 10th day of April, 1879.

This day came again the parties, by their respective attorneys, and the court having maturely considered the motion for a new trial heretofore entered, for reasons stated in writing, and now filed and made a

part of this record, overruled the said motion and refused to grant a new trial, to which ruling of the court the defendant reserves the right to except. Thereupon it is considered by the court that the plaintiff recover against the defendant the sum of five thousand five hundred dollars, and his costs by him about his suit in this behalf expended.

The following is the opinion of the court on the motion for a new trial referred to in the last preceding order:

12 U. S. circuit court E. dist. of Va.

O. A. ERICSSON
v.
THE CITY OF MANCHESTER.

Opinion of the court on motion for a new trial.

The cities of Manchester and Richmond are the corporators of the James River Bridge Company in about equal interests. The work consists of a bridge over the James River, and of an elevated earthen causeway extending from the southern edge of the river on the Manchester side across the flats and over the Danville Railroad (which it crosses upon a stone arch) to the level of 7th street in Manchester, of which it and the bridge are an extension. The accident by which the plaintiff was disabled for life was a fall which he had at night from a low parapet of a corner of the arch over the railroad, down some fifteen feet to a ditch on the side of the railroad. The bridge lies within the corporate limits of Richmond. The causeway, which is a part
13 of it a hundred yards or more long, lies within the corporate limits of Manchester.

This work was a joint public undertaking of the two cities, under the act of assembly passed Nov. 5, 1870, incorporating the James River Bridge Company.

The commissioners incorporated by this act are mentioned as having been appointed by the trustees of Manchester. The city of Richmond, the county of Chesterfield, and certain townships of the county of Chesterfield, were authorized to appoint like commissioners, and in that manner to become corporators of the company; and it was expressly provided that the authorities of Richmond, Chesterfield, and these townships should have control and authority over their respective commissioners similar to that given to Manchaster over its commissioners by the act.

Thus a public highway was provided to be built by two public
14 municipalities, one county, and certain of its townships. In fact, however, it was built by Manchester and Richmond alone.

The cities of Manchester and Richmond are connected by two foot and carriage bridges, open to the public, of which this bridge of the James River Bridge Company is one. It is a free bridge, open to the public without charge of tolls; the other is a toll-bridge.

The City of Manchester is a chartered corporation endowed by statute with liberal powers of taxation. It has full power to close or extend widen or narrow, lay out, improve, and light its streets, and keep them in order. It has ample powers of police. It has all the rights, immunities, powers, and privileges usually granted to, and is charged by statute with the duties and obligations ordinarily imposed on municipal corporations. It may not only tax the property of its citizens but may

contract loans. Its taxes are a lien upon the real estate of the
15 citizens taxed. It may condemn lands for streets, subject to the payment of just compensation.

This is an action on the case for damages, the declaration charging with the usual amplitude of allegation, among other things, that the street on which the accident occurred was a public highway of the city, that it was at the time, and had been for some time before, in unsafe condition for the want of a proper railing or wall to protect persons passing over the arch from accident, and that the defendant had notice of its bad and defective condition, and wilfully neglected to make it safe. (The case was tried at the February term of the court, when a verdict was rendered for the plaintiff in which his damages were assessed at $5,500.

At the trial the defendant insisted generally that a city is not liable to individuals injured for the bad condition of its streets. It insisted, moreover, that this causeway was not a public street of the city, and for that reason that the city was not liable for the accident. It insisted further that the causeway was the property of the James River
16 Bridge Company; that it was under the bridge company's control and not under the control of the city; and for that reason the city was not liable.

Elaborate argument based upon very numerous authorities, was made at the trial by counsel on either side, on prayers for instructions to the jury. The court was obliged to rule upon them off-hand, and in doing so invited in advance a motion for a new trial, in order to a more deliberate argument of the law of the case, in the event of a verdict for the plaintiff, giving the jury the following instructions:

"There are three questions for the jury, viz:

"1. Whether a proper guard or protection had been provided at the point where the accident to the plaintiff occurred. If there was not,

"2. Whether the accident was in consequence of the absence of such proper guard or protection; and

"3. If so, whether damage ensued to the plaintiff, and what
17 amount of money shall be allowed as the measure of the damage to him.

"If the jury believe from the evidence that a proper guard or protection to the highway was not provided; that the accident occurred in consequence; and that damage ensued to the plaintiff from the accident;

"Then the court instructs the jury that the city of Manchester is liable for the damages, unless it proves that the plaintiff sustained his injury through his own negligence or want of care.

"The jury are also instructed that in considering damages in this case they may take into account any permanent future suffering and disability resulting to the plaintiff from the accident."

A motion for a new trial was duly made by the defendant, and the questions of law have since been very fully reargued. The mo-
18 tion is of course based upon the ground that the court misruled at the trial on the law of the case, and I am now to revise that ruling.

There are three questions in the case, viz:

1st. Whether the causeway was a highway or public street of Manchester? If so,

2nd. Whether Manchester, as a municipal corporation, is liable to an

individual for damages resulting to him from the defective or bad condition of its streets? And if so.

3d. Whether the relations of the James River Bridge Company to this particular causeway relieved Manchester from responsibility for its defective or bad condition?

I. As to the first point, I think the causeway was in every sense a public highway; and lying wholly within the corporate limits of Manchester, as it did, I think it was a public street of the city, subject to its control and authority in every way in which any other street
19 of the city is so subject. For the purpose of building the bridge and causeway, which was a joint enterprise of the two contiguous cities, it was found convenient to make use of the instrumentality of a joint-stock company; but the adoption of this method of action was not intended to, and did not, convert what was in its nature a public highway connecting two cities into the private property of a private company. If the two cities had designed by such an expedient to avoid the liability of keeping a public highway in safe condition, I cannot suppose that an act of incorporation for the joint-stock company would ever have been given them by the legislature. This causeway is the only free highway connecting the two cities. It is essentially and necessarily a public highway, and being in the corporate limits of Manchester is in its essential character a public street of that city.

Stress was laid by counsel for defendant upon that section of the charter of the city of Manchester which provides that any street which shall have been open and used by the public as a street for five
20 years shall become a public street and be subject to the control of the council. This section has no other effect than to render the mere fact of a street being open to the use of the public for five years ipso facto a subjection of it to the control and power of the city. The object of the provision was to get rid of the refined learning of the law books on the question what constitutes the dedication of a street to the public in cases where doubt exists. The numerous decisions on that subject cited at bar have no application to cases where there is no doubt about a street being used, and intended to be used, by the public as in the case before us.

Here was a street necessarily public in its very nature. No formal adoption of the bridge by Richmond or of the causeway by Manchester was necessary to constitute them a public highway. They were constructed by public bodies with public funds for public use as a public highway, and were thrown open to the public for free use at the start. A formal adoption of them as a public street would, therefore, have been an idle ceremony. The use of them for five years by the public was not necessary to clear up any doubt as to their public character, and thereby to establish upon them the control and authority of
21 the respective municipalities. I could not so falsify an evident and indisputable fact as to refuse to hold that the causeway in question is a public street of Manchester, as such subject to its control, and as to which Manchester is liable to such duties and responsibilities as the law imposes upon municipal corporations.

2nd. The next question is whether Manchester, as a municipal corporation, is liable for the defective or bad condition of its streets to individuals sustaining actual injury therefrom?

Only a few weeks ago the supreme court of appeals of Virginia, in the case of Noble and wife vs. The City of Richmond, 3 Va. Law Journal, 95, passed upon this question and decided that "a municipal corporation, which, by its charter, has the power to lay out, improve, light,

and keep its streets in order, is liable in damages at the suit of an individual who sustained injuries by reason of the neglect of said corporation to keep its streets in a proper and safe condition; and
22 that such person may recover damages for such injuries in an action in which he alleges and proves that the corporation had notice of defects or want of repairs in its streets (which notice may be implied), and that he was injured in consequence of such defects in a street." The decision was rendered in a case in which the plaintiff's wife had fallen into a hole in the sidewalk of a street of Richmond at night, the hole having been left uncovered and no light placed near by.

This was the first case in which that court had had occasion to deal directly and particularly with this important question of law; and it made this decision after a full review of all the authorities bearing on the subject; citing among others, City of Richmond v. Long's Adm'r, 17 Grat., 375; Sawyer v. Corse, 17 Grattan, 230; the English cases of Henley v. Mayor, &c., of Lyme Regis, 5 Bing., 91; & Russell v. Men of Devon, 2 Term, 667; West v. Trustees of Brocksport, 16 New York, 163; Judge Cooley's opinion in Detroit v. Blacksby, 21 Michigan, 84; Weightman v. Corporation of Washington, 1 Black, 39; and Barnes v. District of Columbia, 1 Otto, 540.

23 The case of a municipal corporation existing by authority of a charter obtained by its solicitation, clothed by charter with powers of taxation and administration, and charged with correlative duties and responsibilities, was distinguished by the court from that of a quasi corporation like a county or township, exercising no statutory authority and having no powers except the limited, ordinary powers incident to counties and towns under the common law.

The Supreme Court of the United States had previously announced this principle in the case of Weightman v. Washington City, 1 Black, 39; upon a wider review, and a much fuller citation of authorities citing the leading English cases, also Erie v. Schwingle, 22 Penn., 384; Storrs v. City of Utica, 17 N. Y., 104; Conrad v. Trustees of Ithica, 16 N. Y., 159; Browning v. City of Springfield, 17 Ills., 143; Hutson v. City of N. Y., 5 Sandford, S. C. R., 289; Lloyd v. Mayor and City of N. Y., 1 Selden, 369; Wilson v. City of N. Y., 1 Den., 595, and 2 id., 450; Rochester White-Lead Co. v. City of Rochester, 3 N. Y., 463 & 763; Smoot v. Mayor, &c., of Wetumpka, 24 Ala., 112; Hicocke v. Plattsburg, 15 Barb., 427; Mayor, &c., of N. Y.,
24 v. Farge, 3 Hill, 612, & other cases. This decision was rendered in a case where the plaintiff had been injured by the falling in of a defectively constructed bridge constructed by agents of the city. The court held that where the charter of a municipal corporation gives it the control and management of a bridge, makes it chargeable with the expense of keeping it in repair, and gives it power to provide the means of doing so, then such corporation is liable to the public for the safe condition of the bridge and to individuals for injuries resulting from its neglect to keep it in repair, and this even though only one end of the bridge is within its limits.

Thus the courts of last resort, both of Virginia and of the United States, to say nothing of other courts, have settled the principle of the liability of a municipal corporation in damages for injuries received by an individual resulting from defects in or the bad condition of its streets; and, therefore, it is useless for me to refer to the multitude of decisions in England and America in which this subject has been
25 discussed. I cannot say that the precedents in England have been consistent. They settle beyond question the principle that a

parish, which is but a mere ecclesiastical precinct, is responsible for damages resulting from the bad condition of its roads: and they settle the opposite principle with equal decisiveness, that such quasi corporations as hundreds and counties are not so responsible. These diverse rulings result no doubt from antiquarian reasons that have no application in this country. But the English precedents also establish the principle that municipal corporations having by charter the extraordinary powers of taxation and control over streets usually given to chartered cities are responsible to individuals injured for defects in their streets: and this latter proposition may be considered to be settled law both in England and America. True, there is the case of Blakeley v. Detroit, 21 Michigan, 84, in which the contrary of this latter doctrine is held; but this case is anomalous, and is overborne by the great mass of contrary authorities on this continent.

26 At all events this court is bound by the ruling of the Supreme Court of the United States in Weightman v. City of Washington, already cited, and of the Virginia court of appeals in Noble and Wife v. City of Richmond, 3 Va. Law Journal, 95. These decisions leave me no alternative but to hold that the city of Manchester is liable to individuals for damages resulting from injuries caused by the defective condition of its streets.

3d. The only question remaining for consideration, therefore, is, whether the fact of the particular causeway in question, having been constructed by and being the property of the James River Bridge Company, relieves Manchester from the liability imposed upon her by law for the safe condition of her streets.

This is the difficult question of the case—difficult because I know of no precedent which has presented the precise facts which constitute the distinguishing features of this case.

27 The point was much relied upon by counsel for the defense, that the mere fact of the James River Bridge Company being liable to the plaintiff (as it certainly is) established the non-liability of the city of Manchester. But it is a non sequitur to insist that such a liability does exonerate the city. If, for illustration, we suppose the case of a turnpike company's road running along and constituting a street of a city I would see no difficulty in holding the company responsible for its defects as a road, while holding the city, at the same time, responsible for its defects as a street. There are many cases of double liability known to the law. In such a case as that of the turnpike, supposed, I should think it clear that there was a dual liability, and that an individual receiving injury from defects in the road or street might elect whether to proceed for damages against the city or against the private company.

I conceive that the existence of a right in an injured person to proceed against the company could not, of itself, negative his right otherwise belonging to him to proceed against the city. Nor could the responsibility of the city to an individual sustaining injury from the defective street in any way affect the responsibility of the com-

28 pany to the city for negligence in respect to its road. The principle of a city's liability for defective streets, notwithstanding the fact that they were under the control and authority of an intervening agency, itself independent of the city, has been established by very authoritative decisions. One of these is the case of Bailey v. Mayor, &c., of New York, 3 Hill, 531, and S. C. 2 Denio 433. The Croton Aqueduct and water works were constructed for the city of New York, under the control and direction of five commissioners appointed

by the governor of the State, who were not responsible to the city. One part of their work, a dam forty miles from the city, had been defectively constructed and had given way, causing great damage to the property of the plaintiff. He sued the city, and under the ruling of the court recovered a verdict and judgment for a large amount. The case was carried to the supreme court of the State, and that court, Judge Nelson (afterwards justice of the Supreme Court of the United States), delivering the opinion, affirmed the ruling of the court below.

It was then carried to the court of errors and appeals (the sen-
29 ate) of the State, where the decision was affirmed, Chancellor Walworth, among others, delivering an affirming opinion. This was a very strong case for the city. The fault was committed by a board which it did not appoint and could in no manner control. The defective work was forty miles beyond its border and its control. Yet, on the principle that she and her citizens were to be the chief beneficiaries of the work, she was held liable.

This New York decision is the more important to us, because it has been made the basis of a decision upon the same point by the Supreme Court of the United States in the case of Barnes v. The District of Columbia, 1 Otto 540. That was an action brought by an individual against the District of Columbia to recover damages for an injury resulting from a fall into a pit made by workmen in grading a street. The liability of the District was denied on the ground that a body of five men, called the Board of Public Works, appointed by the President of the United States, were invested by act of Congress with
30 the entire control of the streets and alleys of the District, and their regulation and repair; that this board (and not the District) was responsible to the public and to individuals for the condition of the streets; that over this board the District had no control; and that the District was consequently relieved from the duties and responsibilities in respect to its streets which might otherwise have attached to it as a chartered municipal corporation. But the court discarded this reasoning and held the District liable. In its opinion, after citing very many cases, in speaking of the case of Bailey v. Mayor, &c., of New York, the court said:

"The learned judge (Nelson) repudiates the argument arising from the fact that the commissioners were appointed by the State; that the defendants had no control over their actions; that they were bound to employ them, and to submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter was responsible for their negligent conduct. * * * *

This case is nearer to the one we are considering than any other
31 reported in the books. The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it."

The only difference between the two cases which have been described and the one at bar is that in them the board or the commission represented a single city, whereas the bridge company represents two corporations, that is, Richmond and Manchester jointly. This, however, does not affect the principle established by the two cases, that the liability of a municipal corporation for the condition of its streets is not relieved or removed by the interposition of a subordinate corporation ancillary to the principal one, and charged with the direct possession

and control of its streets or of a particular street. I think the cases of Bailey v. The Mayor of New York and of Barnes v. District
32 of Columbia furnish the law to the case at bar and establish the liability of Manchester in this suit for the defective condition of 7th street causeway, where the fearful accident which is the subject of this suit befel the plaintiff.

As I cannot change the ruling which I made in the instructions given to the jury at the trial, I must overrule this motion for a new trial.

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held as aforesaid on the 12th day of April, 1879, on motion of the defendant, a writ of error is awarded it.

Defendant's bill of exceptions No. 1.

Be it remembered that on the eleventh day of October, 1878, on the first calling of this action, the defendant pleaded the general issue, and was allowed time to file additional pleas, and that on a subsequent day of the same term, to wit, on the day of , the defendant tendered the special plea, which is in the following words:

33 DEFENDANT'S SPECIAL PLEA.

In the circuit court of the United States for the eastern district of Virginia.

O. A. ERICSSON
vs.
THE CITY OF MANCHESTER.

The defendant, The City of Manchester, by its attorney, comes and defends the wrong and injury, when, &c., and for a further plea to the plaintiff's declaration and to each count thereof, filed by leave of the court first had and obtained, says that the plaintiff ought not to have or maintain his aforesaid action thereof against it, because it says that by virtue of the provisions of a certain act passed by the general assembly of the State of Virginia on the 5th day of November, 1870, entitled "An act to incorporate the James River Bridge Company," (which act is printed and published by the authority of the said general assembly, among other other acts of the said general assembly passed at the same session thereof, in the book entitled "Acts of the General Assembly of the State of Virginia, passed at the session of 1869-'70," in chapter 435, pages 586 et sequitur,) the said James River Bridge Company was and became duly incorporated by the laws of the State of Virginia,
34 and thereafter was and became duly organized under the said act of assembly, which is the charter of said company, and in pursuance of its charter aforesaid, and after its due organization under the same, the said James River Bridge Company proceeded to construct, and did construct, under the sanction of its said charter, a bridge across James River between the city of Richmond and the said city of Manchester, and in order to connect the said bridge with the streets of the defendant the said city of Manchester, the said James River Bridge Company, under the sanction of its charter aforesaid, acquired, by condemnation or otherwise, the right of way over certain lands, which commence at the southern abutment of its said bridge and

end at the then northern terminus of that certain street under the control of the defendant known as Seventh (7th) street in the said city of Manchester, and along the lands over which the right of way was acquired by the said James River Bridge Company as aforesaid, and under the sanction of its charter aforesaid, said company opened, improved, constructed, and established its own certain highway or street, commencing from and at the southern abutment of its bridge aforesaid and terminating at the then existing northern terminus of Sev-
35 enth (7th) street aforesaid; that the aforesaid highway or street acquired, opened, constructed, and established by the James River Bridge Company as aforesaid is not subject to the control of the defendant, The City of Manchester, nor is it the duty of the said city to keep the same in repair, nor is the defendant liable to persons travelling along the said highway for any injuries resulting to them by reason of the insecure or defective condition of said highway. And the defendant further says that the place which the plaintiff in his declaration and in each count thereof describes as unsafe and insecure for travellers, and the place which he describes therein, and in each count thereof, as the place at which in consequence of such alleged insecurity and want of safety he received the injuries complained of, is really a part of the aforesaid highway acquired, opened, constructed, and established as aforesaid by said James River Bridge Company; that the said highway was acquired, opened, and established by the said James River Bridge Company long before the date at which the plaintiff received the injuries complained of by him; and the said highway was not at the time said injuries are alleged to have been received,
36 and is not now, and never has been, subject to the control of the said city of Manchester; and therefore said defendant says there can be no cause of action against it for the damages claimed by the plaintiff for the injuries alleged to have been received by him, and this the said defendant is ready to verify.

And the plaintiff thereupon moved the court to reject said plea, and the court taking time to consider the same, afterwards, to wit, on the day of , having then maturely considered the said motion refused to allow the said plea to be filed; to which ruling and judgment of the court the defendant, by counsel, then excepted, and prayed the court to sign and seal this its bill of exceptions, which is accordingly done, as witness my hand and seal.

RO. W. HUGHES, *Judge*. [SEAL.]

Defendant's bill of exceptions No. 2.

Be it remembered that on the trial of this action the following facts were agreed between the parties:

THE AGREED FACTS.

The following facts are admitted:

37 1. That the old corporation line of Manchester ran through the middle of Semmes street about 280 feet from the arch over the Richmond and Danville Railroad.

2. That on March 22, 1871, the corporation line of Manchester was extended until it took in the place where the accident is said to have happened, and that said place has ever since been within the corporate limits of Manchester.

3. That that part of the street at which the accident is said to have happened was condemned by the James River Bridge Company.

4. That the town of Manchester paid the money due to the original owners for said condemnation according to resolution of James River Bridge Company.

5. That at a meeting of the trustees of the town of Manchester held September 9, 1873, the following report was adopted by them, viz: The trustees having repealed the order establishing the grades of the streets so far as concerns 7th street, and having referred it to the committee on streets to report a suitable grade for this street, said committee recommends that the grade previously adopted be restored as the permanent grade, and that the street be improved according to that grade from the bridge to Perry street, but that further grading
38 be suspended until after the coming winter."

6. That at a meeting of the city council of Manchester, held June 26th, 1874, the following is a part of a report made by the committee on streets of said city, which report was adopted, and the following expenses allowed, viz: 1st, for paving on Bridge avenue, $12.00; 2nd, for filling, $17.88; 3rd, for cinders on R. R. arch, $18.00; 4th, for plank walk-way on 7th st., $98.00; 5th, for wall on 7th st. at R. R. arch, $376.23; 6th, for fence on 7th, near Bridge, $153.35; 7th, for fence at R. R. arch, $6.25. It is understood and admitted that the 3rd expense applies to cinders used and put upon that part of the said 7th st. that lies over the arch of the Richmond and Danville Railroad; that the 4th expense applies to the plank walk-way that runs from the said arch to the free bridge which was built by the James River Bridge Company; that the 5th expense applies to the wall that runs about parallel with the said railroad, and about perpendicular to the wall of said arch, and above which is a small fence described as expense 7th; that the 6th expense applies to the fence that runs from said arch to said free bridge; that the 7th expense applies to the fence that runs about perpendicular to said 7th street, and is at the eastern end of the parapet wall that runs over said arch.

39 That said 7th street has been paved with cobble stones to a point lying from 2 to 3 yards within the parapet walls that run over said arch; that said paving was ordered to be done by the proper authorities of the city of Manchester, and said work was paid for by said city.

That the deposition of the plaintiff taken de bene esse, begun to be taken 19th day of June, 1878, and closed June 21st, 1878, shall be admitted as evidence, in order to prevent the necessity of requiring the plaintiff to be brought into court, as he is still confined to his bed; while the privilege of further examination by either party is to be had if deemed necessary.

That the following are admitted to be the correct measurements of that end of the northern parapet wall over which the plaintiff claims to have fallen:

At the eastern end of said wall the height is 12 inches.
At five feet from said end " " 10½ inches.
At eight " " " " " " 9 inches.
At ten " " " " " " from the pavement 12 inches.

At same point from top of earth pile the height is 6 inches.

Height of earth pile, 6 inches.

The height of side fence running perpendicular to 7th street is 30 inches. Length of fence, 7 yards.

40 The object and reason of the resolution mentioned above as adopted Sept. 9, 1873, is as follows: Col. Clarke, at the request of the street committee of Manchester, furnished the measurement of the grade from the above-mentioned arch on 7th street to Perry street, and the grading and paving were in conformity to these measurements. Most of the grading was done within the old corporation line; a little was done beyond said line, but nearer to the line than to the arch. The cinders were put on the arch to conform the grade to the measurements furnished by Col. Clarke. The town had no engineer, and Col. Clarke gratuitously furnished these measurements. On the embankment between the arch and the free bridge some loads of gravel, earth, and cinders were put there by the street committee to fill up holes, &c., therein.

That Judge Wm. I. Clopton, of Manchester, who is prevented from being present by sickness, would testify, if present, that the plaintiff came to his house on the evening of April 1st, a little after 7 o'clock, and spent the evening with him and his family until about 10 o'clock; that when he left he asked him (Clopton) if the way along Semmes st. was safe, and he told him it was.

41 That, under the charter of the James River Bridge Company, passed by an act of the general assembly of Virginia on the 5th November, 1870, the company thereby chartered was duly organized on the 12th Nov., 1870, the town, now the city, of Manchester then being alone represented through the commissioners named in said charter. That subsequently to the date of said organization, on the 7th Dec., 1870, in pursuance of negotiations previously entered into between the parties, a formal agreement was consummated, under and by virtue of which the city of Richmond became subscribers equally with the town of Manchester; and from and since the said 7th day of December, 1870, by virtue of the agreement aforesaid then made, the board of commissioners of the said James River Bridge Company has been composed of ten members, five of whom are appointed by said city of Richmond as its representatives, and five by the town (now city) of Manchester as its representatives, the whole constituting a board of commissioners representing the cities of Richmond and Manchester, established as a company in the manner authorized by the charter aforesaid. That the said James River Bridge Company, after being finally organized and constituted as a corporation as last mentioned, proceeded to

42 select, and did select, a site for a bridge, in pursuance of said charter, across James River, leading from 9th street, in Richmond, to Chesterfield County, which, by the agreement of the parties, was to be paid for equally by each of said cities.

That on the 20th day of March, 1871, and prior to the making of any of the contracts for the building of said bridge, and prior to the acquisition, condemnation, or improvement of any approaches thereto, the termini of the said bridge were determined on and established by the following resolution, adopted by said bridge company: "That the bridge to be paid for by the James River Bridge Company shall be considered as beginning at a point on the north side of the river where a horizontal line extended on a line along the roadway shall strike the grade of 9th street, and at the south end, where a continuation of the same line will strike the present grade of the earth south of the Danville Railroad, and the expenses of condemnation of land at the respective termini, shall be paid for by the city of Richmond and the town of Manchester, at the ends next their respective location."

It is further agreed that the termini established as above stated are

as follows: On the northern side at some point beyond the
43 northern abutment of the bridge, between said abutment and Byrd street, in the city of Richmond; and on the southern side, at a point in the street leading from the bridge some distance south of the arch over the Richmond & Danville Railroad (being the arch whereat the accident to the plaintiff is alleged to have occurred); the whole of the space covered by said arch, together with a considerable distance of the street immediately adjacent thereto, about 30 feet, and continuous thereof are a part of the highway and within the boundaries prescribed by the aforesaid resolution.

That on the 9th day of February, 1871, the said James River Bridge Company commenced proceedings against E. C. Maye and others in the county court of Chesterfield county, for the condemnation of lands required for the uses of said bridge company, immediately at and next to its southern abutment, being lands comprehended in the description on the south side of the bridge next hereinbefore mentioned. These proceedings for condemnation were ended by a final order of said court, entered on the 14th of March, 1872, under which the title of the said James River Bridge Co. to said lands was established.

That at the time the aforesaid proceedings for condemnation
44 were commenced, and up to the 22d of March, 1871, the lands so sought to be condemned, including the place at which the injury received by the plaintiff is alleged to have occurred, were not within the limits of the town of Manchester, but were situated in the county of Chesterfield. The said lands were brought within the limits of Manchester by an act extending its corporate limits on all sides, passed on the said 22d March, 1871.

That in order to improve as a highway, and render passable the land so acquired by condemnation on the south side of its bridge, the James River Bridge Company, at great expense and out of funds contributed equally by Richmond and Manchester, constructed the heavy embankment from the bridge to the aforesaid arch, built the arch itself including embankment and other work in the roadway adjacent to and immediately south of the arch included in the lands condemned as aforesaid.

And further, that Grattan & Morris, under contract to erect said embankment for the bridge company, were allowed by the city of Manchester to use the extra earth that lay on what is now 7th street, for a couple of streets beyond Semmes street, until they got to the proper grade, and also to cut down a portion of what is now Semmes street.

45 Mr. W. M. Woodward, who has been a member of the board of the said bridge company for two or three years, testifies to the following, so far as he knows and believes:

That the said 7th street has always been open to the use of the public, ever since it has been opened, which occurred 6 or 7 years ago.

That the James River Bridge Company has never, since it was opened, improved, or repaired said street in any way whatever, except they built a walk-house on the south side of said street at their own expense.

Also, that the City of Manchester has repaired from time to time the highway extending from the abutment of the bridge to a point beyond where the alleged accident occurred.

The defendant then put in evidence an act passed by the general assembly of Virginia, approved November 5th, 1870, entitled, "An

act to incorporate the James River Bridge Company," found in the session acts 1869–1870, chap. 435, page 586 (being the charter of the James River Bridge Company), which is referred to in the foregoing facts agreed, which act is in the following words and figures.

46 A bill to incorporate the James River Bridge Company.

Whereas, a bill containing mainly the same provisions hereinafter enacted, & having the same title, passed both branches of the general assembly before its late recess, but the same not having been approved by the signature of the executive, difficulties have occurred tending to embarrass the enforcement of the provisions of said bill; therefore, in order to remove all difficulties in the premises—

§ 1. Be it enacted by the general assembly, that Wm. G. Taylor, Wm. I. Clopton, James M. Moody, C. C. McRae, and Erasmus Gary, who have been nominated by the trustees of the town of Manchester as suitable commissioners to represent the interests of said town, be, and they are hereby, constituted a body corporate under the name and style of the James River Bridge Company, and as such they shall have a common seal, and have authority to sue and be liable to be sued.

§ 2. Said commissioners shall, as soon as convenient, organize by the election of a president, vice-president, and secretary, and after such organization they shall be known as the board of commissioners
47 of the James River Bridge Company. They may enact suitable by-laws for the purposes of their organization, appoint other necessary officers, provided, however, that no member of said board shall receive any compensation for any services performed by him as commissioner.

§ 3. The said board are authorized to contract for the construction & cause to be constructed a bridge across James River at any point from the corporate limits of the city of Richmond to any point on the opposite side of the river, either at, above, or below the town of Manchester.

§ 4. For the purpose of carrying out the provisions of this act the trustees of the town of Manchester, or their successors in authority, are hereby authorized to subscribe, in behalf of said town, a sum not exceeding five hundred thousand dollars; & in order to raise the whole or any part of such subscription the said trustees, or their successors in authority, through the agency of said board of commissioners, may borrow the money, or any part thereof, payable in such times & on such notes of interest, not exceeding twelve per centum per annum, payable annually or semi-annually, as the commissioners, with the approval of said trustees, or their successors in authority, may deem best.

48 The said trustees, or their successors in authority, may execute for such loan coupon bonds, or any other form of obligation the commissioners may deem suitable, and the credit of the town of Manchester shall be pledged for the redemption of such loan, and the same may be secured by a trust deed on the land, with its water-power, appurtenances, and rents, known as the town commons.

§ 5. Said board of commissioners shall, as soon as said bridge is ready for travel, provide for charging tolls and regulate the rates of said tolls; provided, that the maximum rate on any person, vehicle, animal, or article shall not exceed the maximum rate now allowed to be charged for passing over the toll-bridge at Richmond, known as

Mayo's bridge. Said commissioners shall also provide for the appointment of toll-gatherers and other necessary & proper agents.

§ 6. All revenues derived from said bridge shall be managed & kept in such manner as the said board, with the approval of said trustees, or their successors in authority, may prescribe; but the same shall be kept distinct from other funds or revenues of said town, and shall be applied—first, exclusively to the keeping said bridge in repair and
49 paying the current expenses thereof; secondly, to the redemption or repayment of the principal sum, with interest, expended in the original construction of said bridge.

§ 7. The net income derived from the rents of the town common, and the water-power appurtenant thereto, shall be specially set apart and applied to the payment of the interest accruing on the existing bonded debt of the town, together with the interest on any debt incurred by the town under this act, so far as it may be necessary for the said town to look to any source for the payment of the debt contracted under this act other than the revenues to be derived from said bridge.

§ 8. Said board of commissioners may, from time to time, discontinue the collection of tolls, and, from time to time, upon reasonable notice, resume such collections as circumstances may authorize, in pursuance of the other provisions of this act.

§ 9. If any person shall refuse to pay toll when properly demanded, he shall forfeit ten dollars, which, together with the toll so due and costs, shall be recoverable before any justice of the peace. Any sum so recovered shall be applied in the same manner with tolls; but
50 this provision shall not be deemed to impair the right of said board of commissioners or their agents to refuse passage to any person or thing on or over said bridge until the lawful tolls are paid therefor.

§ 10. If any person shall ride or drive on or over said bridge at any gait faster than a walk, the person so offending shall forfeit ten dollars, to be recovered, with costs, and applied as in the preceding section provided.

§ 11. Said bridge, with the roads or streets leading thereto or therefrom, shall not be more than eighty feet wide. Said board of commissioners are authorized to acquire, by contract, the land necessary for the purposes of said bridge and its proper appurtenances, and no more, or they may acquire the same by condemnation, in pursuance of the provisions of chapter fifty-six, code of Virginia, (eighteen hundred & sixty), and the general acts of assembly and laws regulating condemnation of lands for public purposes, to be pursued and adopted as far as practicable and consistent with the provisions of this act, but they shall not acquire any lands or houses used for the purposes of Mayo's bridge, but this proviso shall not be so construed as to prevent the condemnation of any land or houses belonging to the owners of Mayo's
51 bridge not necessary for the uninterrupted passage over said bridge of persons or vehicles.

§ 12. Said board of commissioners are authorized to let the use of said bridge, on such terms as may be agreed on, to individuals or companies for fixed periods, in lieu of receiving from such persons or companies the ordinary rates of toll during such periods; and said board of commissioners may contract with any person or company for a temporary or permanent exemption from tolls of certain persons or other things, or they may contract for such exemption to be either temporary or perpetual, applicable to the owners or occupiers of particular tracts,

lots, or parcels of land which last-named right of exemption shall be appurtenant to the land, and shall be evidenced by such instruments and in such forms as the said board of commissioners may, by its by-laws, prescribe, or may otherwise be agreed on between the parties; and the clerk of the county court of Chesterfield is required to record in the deed-book of said county any such evidence of exemption offered for record, if certified as deeds are required to be certified for record.

§ 13. Said bridge may be constructed with the view of accommodating a street railway over the same, and the said board of
52 commissioners may construct such railway, and out of the capital stock and funds of said company put and keep the same in operation, or they may contract with other persons or companies either for the construction of such street railway or for running their cars over the same, or both purposes; and said commissioners are authorized to extend such street railroad to any point or points over and through the streets of Manchester, or over the roads and streets adjacent thereto, in the county of Chesterfield, not exceeding five miles in any branch from the corporate limits of said town; and they are also authorized to connect said railway with the street railway in Richmond, with the consent of the company or other persons owning said last-named street railway, and of the council of the city of Richmond.

§ 14. The right of condemnation or purchase shall apply to the opening of any new street or road either within or without the corporate limits of Manchester, in the county of Chesterfield, or for the widening of any existing street or road which may be deemed by said commissioners convenient for the use of said bridge or railway.

53 § 15. All persons residing in the town of Manchester shall, during such residence, be entirely exempt from tolls on their persons. All vehicles, animals, or articles kept in said town by persons residing therein, shall be subject to like exemption from tolls; and all persons or companies leasing water-power from said town in regard to all transportation connected with their business as such lessees, shall be entitled to like exemption, without regard to the personal residence of such lessees, when the transportation is done by vehicles and animals exempt from tolls as above, or by vehicles and animals kept by such lessees in said town. It shall be incumbent on any person or company to establish or prove his or their claim to exemption under this section in such manner as the said board of commissioners may prescribe.

§ 16. The said board of commissioners, with the approval of the trustees, or their successors in authority, of the town of Manchester, are authorized to negotiate with the proper authorities of the county of Chesterfield, or any township formed or to be formed therein, and with the common council or other proper authorities of the city of Richmond, in accordance with the 67th section, chapter 5, of the charter of said city, and with individuals
54 or with any of them, for subscription to be made by such county or any township therein, and by said city or by such individuals to the capital stock of said company; and if any such subscriptions are made, a corresponding reduction shall be made in the subscription otherwise necessary to be made by the town of Manchester; and the authorities of the county of Chesterfield, or any township thereof, or of the city of Richmond, agreeing with the said board of commissioners, with the approval of the trustees of Manchester or their successors in authority, shall have like powers with the said trustees of Manchester, or their successors in authority, to borrow the money subscribed

by them, or any of them. Such agreement may involve a temporary, perpetual, or partial exemption from tolls of the residents of the county, city, or township subscribing; and the county or township or city subscribing may appoint such additional members of the board of commissioners, in proportion to their subscriptions, as may be agreed on, to represent such county, township, or city: provided, however, that the whole number of such commissioners shall not exceed fifteen; and any additional commissioners so appointed shall constitute a part of
55 the original board organized as hereinbefore provided. The proper authorities of the county, township, or city subscribing under this section shall have relation and authority to and over the commissioners appointed by them similar to that conferred on the trustees of the town of Manchester, or their successors in authority, in regard to the commissioners representing said town.

The town of Manchester shall be exempt from the burden of any subscription made under this act otherwise than the subscription made by said town in its corporate character; and any subscription which may be made by the county of Chesterfield, or by the township of which Manchester forms only a part, shall be made in behalf of and charged exclusively against that part of the said county, or that part of the township, as the case may be, not embracing the corporate limits of said town, in like manner as though such town did not constitute a part of such county or such township.

§ 17. The board of commissioners named in this act alone, or, if others be appointed under the preceding section, the board so constituted may, in their discretion, take subscriptions from individuals for any amount of the capital stock not otherwise raised, to be in like manner
56 used also in reduction of the subscription on behalf of said town of Manchester, and such individuals may together appoint commissioners in proportion to the aggregate of their subscriptions aforesaid; and the authorities of the town, county, township, or city represented by said commissioners respectively, may agree, severally or jointly, to guarantee any loans made by or in behalf of said individuals, or any of them, to effect their subscription, & take from such individuals such security on real estate as may be agreed on to indemnify the corporation or corporations so guaranteeing from loss.

§ 18. The commissioners named in the first section of this act shall alone, or other, if any other be associated with them under the provisions of this act, together with such others, continue in office until the first day of May next succeeding one year from the completion of the bridge authorized in this act, or until their successors are respectively appointed, as hereinafter provided.

§ 19. The trustees of the town of Manchester, or their successors in authority, and the county, city, or township, as the case may be, and any individual subscribers subscribing under this act, shall appoint, after one year from the completion of said bridge, annually, in
57 the month of January or thereafter, the number of commissioners they are respectively entitled to have in said board, whose time of service shall commence from the first day of May of each year, or for the unexpired term of one year from the first day of May of each year (if such appointments be made after the first of May), and such commissioners so hereafter to be appointed shall reside in the county, city, or town, or township, as the case may be, of the respective corporations they respectively represent, except that any commissioners which any individual subscribers are authorized to appoint may reside either in the city of Richmond, or the county of Chesterfield, or the

town of Manchester; but such commissioners elected on behalf of individual subscribers shall vacate their office by subsequent removal from the corporation or township in which they resided when elected.

§ 20. The commissioners acting under this act shall not be personally liable on any contract or undertaking made in pursuance thereof, but the town, county, city, or township, or individuals they may represent shall be respectively bound in proportion to their respective unpaid subscriptions. The company may be sued by bill in equity in
58 the chancery court of the city of Richmond; and if subscriptions are made by parties other than the town of Manchester, the corporations and individuals shall be made parties defendant as well as the commissioners; but summons against individual subscribers may be served by publication. The court shall ascertain which of the said town, county, city, townships, or individuals are particularly liable, and decree redress accordingly.

§ 21. All meetings of the said commissioners shall be held in the town of Manchester or city of Richmond, a majority of the commissioners shall constitute a quorum for business. They may prescribe the periods for regular meetings.

§ 22. The bridge constructed under this act, together with land and appurtenances acquired under section 11, of this act, shall be bound, without any written mortgage, pledge, or security, other than this act, for any loans made to effect its construction; and the holders of all bonds or obligations issued for this purpose, may enforce the lien hereby created by suit in equity in the chancery court of the city of Richmond; and the said court may direct the lease or sale of said bridge, as may be appropriate and proper, to secure a satisfaction of such lien;
59 and any such purchaser or lessee shall be substituted to all the rights of the company to charge tolls, and all exemptions from tolls shall, so far as necessary, cease in favor of the purchaser or lessee, wholly or partially, as the court may direct.

§ 23. The town, city, county, or township making loans under this act may, any or all of them, agree, any one or more, to become liable as surety for the loans effected for the purposes of this act, by any one or more of them, such undertaking between parties so agreeing being reciprocal; but any pledge or mortgage made of the town common aforesaid, shall be made only in regard to the subscription in behalf of said town.

§ 24. The construction of the bridge herein authorized may be commenced at any time within two years from the passage of this act, and completed within five years thereafter.

§ 25. The commissioners acting for each town, city, county, or township may supply any vacancy occurring in their respective members, before any election is authorized, or until successors are appointed under this act.

§ 26. The company hereby incorporated shall enjoy all the rights conferred, and be subject to all the liabilities imposed on other bodies corporate by the statutes and laws of Virginia, as far as applicable
60 and consistent with this act.

§ 27. This act shall be in force from its passage, and shall be subject to modification or repeal at the pleasure of the general assembly; and all acts or parts of acts in conflict with the provisions of this act are hereby repealed.

An act of the general assembly of Virginia (being the charter of the city of Manchester), approved March 20th, 1874, contained in the ses-

sion acts 1874, chap. 118, page 108, was now placed in evidence; which is in the following words and figures:

An act providing a charter for the city of Manchester, approved March 20, 1874.

1. Be it enacted by the general assembly, that the territory contained within the limits prescribed by the act entitled "An act to extend the corporate limits of the town of Manchester," passed March twenty-second, eighteen hundred and seventy-one, and by any act hereafter passed by the general assembly of this State, shall be deemed and taken as the city of Manchester, and the inhabitants of the city of Manchester, for all purposes for which towns and cities are incorporated
16 in this commonwealth, shall continue to be one body politic in fact & in name, under the style and denomination of The City of Manchester, and, as such, shall have, exercise, & enjoy all the rights, immunities, powers, and privileges, & be subject to all the duties and obligations now incumbent and pertaining to said city as a municipal incorporation. That all property, real & personal, owned by & belonging to the town of Manchester shall pass to & be held by the city of Manchester in the same manner & subject to the same trust as the same is now held by the trustees of the town of Manchester; and the said city of Manchester shall be responsible for all liabilities and obligations of the trustees of the town of Manchester.

Said city & its inhabitants shall be exempt from all assessments of levies in the way of taxes imposed by the board of supervisors of Chesterfield County, or any other authorities whatever in said county, for any purpose whatever, except upon property in the said county of Chesterfield owned by the inhabitants of said city; nor shall the said inhabitants be liable to serve upon juries in said county, except in cases especially provided by law; provided, however, that the said city of Manchester shall contribute its due proportion to the payment
62 of all debts due and liabilities heretofore contracted or incurred by the county of Chesterfield.

And whenever the board of supervisors of said county shall notify the mayor of said city, in writing, that any debt or liability now existing upon said county is due, & payment of the same has been demanded, it shall be the duty of the common council of said city to provide, in their next annual levy for taxes upon said city, a sufficient sum of money to pay the proportionable share of said city's liability for the particular debt or debts specified in said notice. The last assessment for county & State purposes made in said county prior to the passage of this act shall be the basis of contribution between said city & county in the adjustment of any such liability. Any sum or sums of money required of said city as aforesaid by the board of supervisors of said county shall be paid out of the treasury of said city upon a warrant drawn upon said treasury by the president of said board of supervisors under the order of said board, & endorsed by the mayor of said city upon the order of the common council.

19. The council shall have, subject to the provision herein
63 contained, the control and management of the fiscal & municipal affairs of the city, and all property, real & personal, belonging exclusively to said city, as now provided by law, and may make such ordinances, orders, & by-laws relating to the same as it shall deem proper & necessary.

They shall likewise have the power to make such ordinances, by-laws,

orders, and regulations as they may deem desirable to carry out the following powers which are hereby vested in them:

VII. To close or extend, widen or narrow, lay out, graduate, curb, & pave, & otherwise improve streets, sidewalks, & public alleys in the city, & have them kept in good order & properly lighted; & over any street or alley in the city which has been or may be ceded or conveyed to the city by proper deed, they shall have like power & authority as over other streets & alleys; they may build bridges in & culverts under said streets, & may prevent or remove any structure, obstruction, or encroachment over or under or in any street, sidewalk, or alley, avenue or public square in said city, & may permit shade trees to be planted along said streets; but no company shall occupy with its works or any appurtenances thereof the streets, sidewalks, or alleys of the city
64 without the consent of the council duly entered upon its record. In the meantime no order shall be made & no injunction shall be awarded by any court or judge to stay the proceedings of the city in the prosecution of their work, unless it be manifest that they, their officers, agents, or servants, are transcending the authority given them by this act, & that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

XVIII. To require & compel the abatement & removal of all nuisances within said city at the expense of the person or persons causing the same, or owner or owners of the ground whereon the same shall be. To regulate & prevent slaughter-houses, soap & candle factories, or the prosecution of any dangerous, offensive, or unhealthy business, trade, or employment therein, & to regulate the transportation of coal & other articles through the streets of said city.

24. Whenever any street, alley, or lane in said city shall have been opened to & used as such by the public for the period of five years the same shall thereby become a street, alley, or lane for public purposes, & the council shall have the same authority & jurisdiction over & right & interest therein as they have by law over the streets, alleys,
65 & lanes laid out by them; and any street or alley reserved in the division or subdivision into lots of any portion of the territory within the corporate limits of said city, by a plan or plot of records, shall be deemed & held to be dedicated to public use, unless it appears by said record that the street or alley so reserved is designated for private use; but upon a petition of a majority of the persons interested therein the council shall have power to open the same for the use of the public.

25. Whenever any new street shall be laid out, a street graded or paved, a culvert built, or any other public improvement whatsoever made, the city council may determine what portion, if any, of the expense thereof ought to be paid from the public treasury, & what portion by the owners of the real estate benefitted, or may order & direct that the whole expense be assessed upon the owners of the real estate benefitted thereby; but no such public improvement shall be made, to be defrayed in whole or in part by a local assessment, until first requested by a petition signed by at least a majority of the owners of property to be assessed for such improvement, or unless three-fourths of all the
66 council shall concur in voting any improvement to be expedient, or in determining to make the same after allegations have been heard, in which case no petition or request shall be necessary. The council shall have the same powers to collect such local assessments for improvements as are hereinafter vested in them for the collection of taxes.

MEMORANDUM.—It is understood and agreed by the parties to this suit that only certain sections of the charter of Manchester need be copied in the record by the clerk, but that said charter shall be regarded as a public act, and that the whole charter may be referred to and discussed from the acts of assembly of Virginia.

MEREDITH & COCKE,
For Pl'ff.

C. C. McRAE,
For City of Manchester.

And then an act of the general assembly of Virginia, passed March 22nd, 1871 (Acts 1870–'71, chap. 166, p. 247), entitled "An act to extend the corporate limits of the town of Manchester," was introduced in evidence; which was in the following words & figures:

An act to extend the corporate limits of the town of Manchester, approved March 22nd, 1871.

1. Be it enacted by the general assembly of Virginia, that the corporate limits of the town of Manchester be extended from the present exterior lines of said town to the following lines, to wit: Commencing above said town at a point on the southern shore of James River, opposite the point at which Canoe Run crosses the Richmond & Danville Railroad, which is just below the Spring Hill mill site; thence to said crossing; thence to a point at which the southern line of
67 Maury street, of Marx's addition, extended westward, intersects with the western line of the Richmond and Petersburg Railroad, and thence down said southern line of said Maury street to James River, below said town; thence up said river coincident with the present city line of the city of Richmond, as far as the line of said city extends in that direction; thence up said river, coincident with the line of the county of Henrico, to the beginning.

2. That the territory so included shall be, to all intents & purposes, a part of said town, and all laws and parts of laws applicable to said town shall apply with equal force & effect to the same.

3. That all the obligations and duties, rights, benefits, & privileges, now incumbent upon or enjoyed by the citizens of the said town shall be equally incumbent upon & enjoyed by the people resident in said newly-incorporated territory.

4. That after the trustees of the town of Manchester shall have caused to be made a survey of said newly-incorporated territory or any part thereof, and shall have either designated or laid off streets, squares, and lots within the same, it shall be unlawful for any person to
68 build or construct any house, building, or other improvements in said streets, laid off or designated as aforesaid, unless authorized so to do by the proper town authorities; and the said trustees are hereby empowered to pass such ordinances as may be necessary to enforce this section, which shall not be in conflict with the laws of this State.

5. This act shall be in force from its passage.

The plaintiff then, by consent of the defendant, introduced the deposition of the plaintiff, which is in the following words:

69 *Notice to take deposition de bene esse.*

O. A. ERICSSON
vs.
THE CITY OF MANCHESTER.

This is to give notice that I shall, on the 19th day of June, 1878, at twelve o'clock of that day, at the city of Richmond, at the hospital known as the "Retreat for the Sick," on Marshall street between 12th and 13th streets, proceed to have taken "de bene esse" my testimony or deposition in the matter now pending in the United States circuit court for the eastern district of Virginia, at Richmond, in which you are defendant and I am plaintiff.

The taking of said deposition, if not completed, will be continued from time to time until completed. The reason for taking said deposition is that I am suffering from bodily injuries from which death may probably ensue.

O. A. ERICSSON,
By Counsel.

Marshal's return.

Executed this 5th day of June, 1878, by delivering a copy of this writ to James A. Clarke, mayor of the city of Manchester.

C. P. RAMSDELL,
U. S. Marshal.

70 The deposition of O. A. Ericsson, taken before me, M. L. Spottswood, a notary public for the city of Richmond, State of Virginia, pursuant to notice hereto annexed, at the city of Richmond, at the hospital known as the "Retreat for the Sick," situated on Marshall street between 12th and 13th streets, on the 19th day of June, 1878, at twelve o'clock of that day, and if not completed, then to be continued from time to time until completed, to be read as evidence on behalf of O. A. Ericsson, said deposition taken to be read as evidence "de bene esse" on behalf of O. A. Ericsson; in the matter or suit now pending in the United States circuit court for the eastern district of Virginia, at Richmond, in which O. A. Ericsson is plaintiff and the city of Manchester is defendant.

Present, G. K. Macon & C. V. Meredith, counsel for plaintiff.
" C. C. McRae & James A. Clarke, " " defendant.

Mr. O. A. ERICSSON, the plaintiff, being first duly sworn, deposes and says:

1st question by defendant's counsel on the "voir dire." Are you the plaintiff in this suit?

Answer. Yes, sir.

(The defendant by counsel objects to the competency of the witness, on the ground that the defendant itself cannot testify.)

71 1st question (by counsel for plaintiff). What is your name, age, occupation, and where do you reside?

Answer. My name is O. A. Ericsson. I am fifty-five years old; am a teacher, and reside in Richmond, Virginia.

2d question (by same). Where were you born?

Answer. In Sweden.

3d question (by same). Have you, or not, ever become a citizen of the United States of America, by being naturalized?

Answer. I have not.

4th question (by same). Of what country or kingdom are you still a citizen?

Answer. I am a citizen of the kingdom of Sweden and Norway.

5th question (by same). Please state on what day the accident happened for which you have brought suit against the city of Manchester.

Answer. The night (about twenty minutes past ten o'clock) of April 1st, 1878.

6th question (by same). Please state the facts and circumstances connected with the accident above mentioned.

72 Answer. I left Richmond about seven o'clock in the evening of the 1st of April, 1878, and went over to Manchester to visit Judge Clopton, and remained with him until ten o'clock that night, having gone directly there from Richmond. I spent the evening there talking to Judge Clopton and his wife, and took tea with them. On leaving the house the judge went with me out to the gate; and I not being well acquainted with the street that led up to the judge's house, I asked him if there were any ruts or holes, or anything that made the street leading from his house dangerous; the judge answered me, "No," I walked down the street very cautiously feeling with a stick that I held, until I struck the street leading over the bridge. The street is called 7th street, I believe. Then I relaxed my attention, considering myself perfectly safe, as I was then on the high road. The night was very dark, and there was no light. I turned to come over the bridge, after having passed the bend, and walked along at a moderate pace, thinking about some private business, when my foot suddenly struck against something, and receiving a sudden impression that it might be some kind of a sidewalk, I stepped upon it, and in taking the next step found myself falling. I had no time to form an idea what
73 it was over which I stepped before I fell, as the whole occurrence did not occupy more than four or five seconds. I struck against the ground, but did not lose my consciousness; upon finding that I was unable to rise, I commenced calling loudly for help. After the lapse of about fifteen or twenty minutes, as near as I can judge, some negroes arrived and being told the state of the case, they provided a lantern, and carried me up the embankment and laid me down on the road.

Two young gentlemen, by the name of Lipscomb and Cook, coming from Richmond, now arrived. A hack was procured from Richmond, in which I rode over to Richmond, some one having gone over to Richmond for the hack. I was accompanied by the above-mentioned young men and two or three negroes. My suffering was now so great that in coming over to Richmond they had to stop the carriage three or four times on the bridge. They had to continue stopping after getting over to Richmond until they brought me to the Retreat for the Sick, where I arrived about 12 or 12½ o'clock.

7th question (by same). Do you know, or not, whether after you got upon the street leading to the bridge you walked on the pave-
74 ment or in the roadway of the street?

Answer. I am not sure whether there is any sidewalk or not, and I am not sure whether I walked in the roadway or on the sidewalk, if there is one.

8th question (by same). When you struck the street leading to the bridge, upon which side did you enter?

Answer. I necessarily struck the left side of the street leading to Richmond—that is, the left side of the street when going to Richmond.

9th question (by same). On which side of the street did you fall?

Answer. The right.

10th question (by same). Whereabouts in that street did you fall?

Answer. At a very short distance from where the Danville road runs under the street. I don't think more than two yards from the railroad, toward Manchester.

11th question (by same). Can you tell about how high you lifted your foot to step upon the parapet of the bridge or archway where you fell?

75 Answer. As near as I can judge, about five or seven inches.

12th question (by same). Did you fall upon level ground or not?

Answer. I fell upon level ground, and near the edge of a short slope, down which I afterwards rolled. The length of the slope, I think, is about a half a yard or so. I cannot tell, for of course in such a situation I could not judge of distances.

13th question (by same). When you fell, against what did you strike, upon the ground or other substance?

Answer. Upon the ground.

14th question (by same). When you rolled down the slope into what did you roll?

Answer. I rolled into muddy water.

15th question (by same). About how long did you lie in that muddy water?

Answer. I rolled down the slope almost immediately after I fell, and lay the rest of the time, about fifteen or twenty minutes, in this muddy water.

76 16th question (by same). Did you try to extricate yourself from that position?

Answer. Yes; without succeeding.

17th question (by same). Why was it you failed?

Answer. On account of the injuries I had received.

18th question (by same). You say you were carried to the house known as the Retreat for the Sick. Have you been there ever since, and are you there now?

Answer. Yes.

19th question (by same). Have you been detained at that house ever since on account of the injuries received from the accident above described?

Answer. Yes.

20th question (by same). State as near as you can the nature of your injuries received by the fall above described.

Answer. I had a right leg broken, the left paralysed so as to preclude any use of it, and the urinary organs and those of evacuation paralysed, so as to entirely place them beyond my control, so

77 that I involuntarily evacuate and pass water.

21st question (by same). State from which of these injuries you have recovered, either partially or entirely.

Answer. I have recovered from none entirely. I have partial control of my legs, but not of my feet. The other injuries remain as they were.

The further taking of these depositions is continued until to-morrow morning at 12 o'clock, at the same place.

M. L. SPOTTSWOOD, *N. P.*

RICHMOND, VA., *June 20th*, 1878.

Room of O. A. Ericsson, at the Retreat for the Sick, 12 o'clock. Deposition of O. A. Ericsson resumed.

Present, G. K. Macon and C. V. Meredith, counsel for plaintiff.
" C. C. McRae and James A. Clarke, counsel for defendant.

22d question (by counsel for plaintiff). Have you or not been confined to your bed ever since the fall or accident above mentioned, by reason of the injuries above stated, and are you now so confined?

78 Answer. I have been so confined and am now.

23d question (by same). Are you yet able to change your position by your own exertion or strength?

Answer. I can turn from my position on my back to that on my side without assistance, and can lift myself some six inches on my elbows, but the injury to my spine prevents me from raising myself higher.

24th question (by same). Were you at any time since the above-mentioned injuries unable to change your position by your own exertion, from your back to your side?

Answer. Yes. I have been able to turn from my back to my side without assistance for about two or three weeks.

25th question (by same). For how long have you been able to move your legs?

Answer. For about the same time, perhaps a little longer.

26th question (by same). Please state whether or not you are near-sighted; and, if so, to what degree.

A. I have been very near-sighted ever since my childhood. I use a number 9 glass.

79 27th question (by same). Please state your means of support.

Answer. By teaching Latin, French, Greek, and German, and by writing as an author.

28th question (by same). About what were you particularly engaged at the time of your accident?

Answer. I was engaged then in getting ready for publication a work I had written, and was in correspondence with the publishers. This work I had partly written and was then completing.

29th question (by same). What has been your means of support since the injuries received?

Answer. None.

30th question (by same). State whether or not there are any expenses attendant upon your confinement at the Retreat for the Sick.

Answer. They charge, I think, from seven to twelve dollars a week, but I have not made any agreement with them yet.

31st question (by same). Have you or not a family dependent

80 upon you; if so, state how many compose it?

Answer. Yes, sir, I have; my wife and two children—one child a girl of fourteen, and a boy of twelve years of age.

32nd question (by same). During your confinement here, where has your wife been residing?

Answer. My wife has been residing in Richmond part of the time with some friends, and part of the time she has been sharing my room here with me.

33d question (by same). State whether or not on the day of the acci

dent you had been drinking any intoxicating drinks; if so, about how many drinks, and at what time or times did you drink them during that day or evening?

Answer. I had taken one glass of beer, at dinner, about one o'clock, and that was all. In coming over the bridge to Richmond in the carriage after the accident they gave me a drink of whiskey to prevent my fainting.

Cross-examined by Mr. C. C. McRAE:

81 1st question (by C. C. McRAE). How long since you left your native country?

Answer. About twenty-five years.

2d question (by same). Where have you resided in that interval?

Answer. As near as I can come to it, about three months in the city of New York, and about a year in Morristown, New Jersey, and the balance of the time in Richmond, Virginia.

3rd question (by same). If I understand you, then, you came directly from London to New York, resided there about three months, removed thence to Morristown, New Jersey, from which place, after a residence there of one year, or about, you removed to this city, Richmond, where you have continuously resided?

Answer. I went from New York to the town of Boonton, New Jersey, where I resided a short time, it might have been four or five months, I don't exactly remember, and from there I removed to Morristown, and from Morristown to Richmond.

4th question (by same). Please state as nearly as you can the dates of your departure from Sweden and arrival in Richmond.

82 Answer. I could not positively tell. It was somewhere in the fall of 1852 or 1853 that I left Sweden, and I arrived in Richmond, as near as I can recollect, some sixteen or twenty months later.

5th question (by same). Your residence in Richmond has been, then, uninterrupted since you first reached that place?

Answer. Yes; except with an occasional absence of one or two months in the country.

6th question (by same). At the time of leaving Sweden, or since, have you taken any legal steps to expatriate yourself?

Answer. At the time I left Sweden, Sweden did not recognize any such thing as expatriation, according to my impression.

7th question (by same). You have stated that you were never naturalized. Did you ever declare your intentions, under the sanction of the laws of the United States, to become a citizen thereof?

Answer. About a year and a half after my arrival in the United States I declared my intention to become a citizen of the United
83 States, but changed my mind afterwards and abandoned the idea, and have never become naturalized.

8th question (by same). In what place and in what court was that declaration made?

Answer. In Richmond. The court I don't recollect.

9th question (by same). Can you state what particular reason induced you to change your purpose?

(Objected to by counsel for plaintiff as immaterial and irrelevant.)

Answer. I met a fellow-countryman, a Swede, in the street one day, who stated to me that he was on his way to declare his intention of becoming a citizen of the United States, and asked me to go with him. I went without giving the matter any due consideration, but afterwards, in thinking the matter over, it occurred to me that upon entering the University of Upsala, in Sweden, I had taken an oath of fidelity to the

Swedish Government, for which reason I abandoned my hasty determination.

10th question (by same). Do you mean that the declaration was made when you accompanied your countryman at the time referred to?

84 A. Yes.

11th question (by same). On your visit to Judge Clopton's residence did you return by the same route you had taken to go there?

Answer. Yes.

12th question (by same). You have stated that you approached 7th street from another street striking 7th street at, I infer, right angles. Which direction did you take, and how far did you proceed after leaving Judge Clopton's house before reaching the street leading into 7th street?

Answer. I went a short distance toward Belle Isle before striking the street leading into 7th street.

13th question (by same). May you not be mistaken as to the point at which the accident occurred; and, if not mistaken, please state how you can fix approximately the point at which the accident occurred?

Answer. Well, I know it was in the neighborhood of the railroad; but it was very dark, and I was unacquainted with the premises.

85 I may not be able to tell exactly the spot where I struck the ground. That can, however, be ascertained with more accuracy by the men who picked me up.

14th question (by same). How far do you think you were from the center of the arch toward Manchester when you fell?

Answer. The deep darkness prevents me from telling that with exactness.

15th question (by same). (The reply of the witness to the 10th question-in-chief is here read to him.) Do I understand you in that answer to locate the point at which you struck the ground at a distance of not more than two yards removed from the railroad track towards Manchester?

Answer. Such was my impression, although in the darkness and the state of excitement *sub*sequent upon my fall it would, of course, be impossible to state the exact distance.

16th question (by same). Do you make these statements upon your acquaintance with the premises; if not, how are you otherwise informed?

86 Answer. I do not, but I know that it was not far from the road, though my condition then made it impossible for me to calculate distances with precision.

17th question (by same). You are aware that there are but two regular approaches by bridge from Manchester, namely, Mayo's bridge and the bridge known as the free bridge. What particular reason had you for selecting the free bridge route?

Answer. Because I considered it nearer from my residence to Judge Clopton's house.

18th question (by same). How often have you been in the habit of going to Manchester within the last five or six years?

Answer. Not often; within the last six or eight months only a few times.

19th question (by same). Which bridge did you take?

Answer. I generally went by Mayo's bridge.

20th question (by same). Did you ever go over the other bridge?

Answer. Yes; but rarely.

87 The further taking of these depositions is continued until to-morrow morning at ten o'clock, at the same place.

M. L. SPOTTSWOOD, *N. P.*

RICHMOND, VA., *June 21st*, 1878.

Room of O. A. Ericsson, at the Retreat for the Sick; 10 o'clock. Deposition of O. A. Ericsson resumed.

Present, G. K. Macon and C. V. Meredith, counsel for plaintiff.

" C. C. McRae, counsel for defendant.

21st question (by C. C. McRAE). How often do you think you have passed over the free bridge since its construction?

Answer. It is impossible to tell; some six or eight times, I reckon.

22d question (by same). You were visiting Manchester, I suppose?

Answer. Yes; of course.

23d question (by same). You then had to pass over this arch at which the accident occurred, had you not?

Answer. Yes.

88 24th question (by same). You knew the arch was there then, and had seen it, had you not?

Answer. Yes.

25th question (by same). You knew of the existence of the parapet walls, did you not? I refer to the wall over which you suppose you fell.

Answer. Well, I did not pay any particular attention to that.

26th question (by same). Was it light enough to observe the surroundings, in passing over the arch on going to Judge Clopton's?

Answer. I don't recollect; but I went there about seven o'clock or after, on the 1st of April.

27th question (by same). When was the last trip taken by you over this arch, next before the visit to Judge Clopton?

Answer. I do not remember, but it was a considerable time before that visit; in fact, it must have been some four or five months. I can't say now.

89 28th question (by same). Do you remember when you went?

Answer. No; I don't remember.

29th question (by same). Did you pass over the bridge and arch unaccompanied by any other person on the occasion of the visit to Judge Clopton's?

Answer. Yes. I was alone.

30th question (by same). Where was your residence located in the city of Richmond on the 1st of April?

Answer. On the corner of Bank and 11th streets.

31st question (by same). How long have you been residing there?

Answer. About one year.

32nd question (by same). Do you remember the name of the judge, or if more than one, any of the judges, constituting the court in which you declared your intention of becoming a citizen of the United States?

Answer. I do not.

33rd question (by same). Do you recollect the location of the building in which the court was held?

90 Answer. No.

34th question (by same). Can you give the name of the friend who accompanied you to the court-house?

Answer. It was one of the Swedes residing here at that time, but I do not distinctly remember which one.

35th question (by same). In falling, what part of your body struck the ground first?

Answer. Some of the lower parts of my body, but I cannot distinctly say which, it was either my feet or my backside, I cannot say which, but my impression is that it was my feet which struck first.

36th question (by same). In which direction was your face turned when you slipped off?

Answer. Toward Richmond.

37th question (by same). Then you must have made an abrupt turn from the line of the street at that point, must you not?

Answer. Not necessarily. I might have been walking close
91 to the parapet, although the darkness prevented me from telling exactly where or how I walked.

38th question (by same). Am I correct in having understood you to say in your examination-in-chief that you put one foot & only one foot on the wall, and that you fell over on making the next step.

Answer. Well, it might have been the next step or two, but not more, I think; the occurrence took place in so short a time, say some four or five seconds, as to preclude a perfectly distinct idea of its nature.

39th question (by same). You have spoken of a bend in 7th street, does that bend continue on both sides of the arch?

Answer. Not as I recollect; I think it goes straight from the arch to the bridge.

40th question (by same). From the point at which you struck 7th street, proceeding toward Richmond, and before getting to the arch, about where does this curve commence?

Answer. I don't distinctly remember, but I think in the neighborhood of a brick house on the right side going to Richmond.

41st question (by same). What other buildings, if any, were in the same vicinity on the Manchester side of the arch?

92 Answer. Well, I think there are some buildings scattered around the neighborhood, though I cannot say whether any of them touch the street. I think they do not. I mean they are not on the line of the street.

42nd question (by same). Do you habitually wear your eye-glasses?

Answer. Yes.

43rd question (by same). Were you wearing them when the accident happened?

Answer. Yes, and lost them too, in falling.

44th question (by same). Did you recover them?

Answer. No.

45th question (by same). Were they found or not?

Answer. I don't know; they have never been returned to me.

46th question (by same). Were you ever engaged in teaching in Manchester.

Answer. Yes.

47th question (by same). When and at what places?

93 Answer. It must have been some two or three years ago, at Mr. Brooke's office on 10th street beyond Hull, but I only gave four or five lessons. These are the *are the* only times and place I taught.

48th question (by same). Can you recall any places you visited in Manchester socially other than Judge Clopton's, or any places besides Mr. Brooke's office that you visited on business?

Answer. I never visited any other places in Manchester socially, having very few acquaintances, and I only recollect one place that I visited on business, namely, the bank.

49th question (by same). Was the visit made to Judge Clopton on the first of April the only one made there?

Answer. No; I visited him once before. It was some time ago; I don't exactly remember when.

50th question (by same). Did you pass over the free bridge and arch then?

Answer. I did not. I had some business on Hull street, and remember inquiring there for Judge Clopton's residence, and then having some business on Hull street, I most always passed over Mayo's bridge, it being the nearer way from my residence.

94 51st question (by same). Where was your residence at the time of your first visit to Judge Clopton's?

Answer. On the corner of Bank and 11th streets.

52nd question (by same). On that occasion I understand, then, you crossed Mayo's bridge, both in going to and returning from Manchester? Am I correct?

Answer. I came over Mayo's bridge and think that I returned on the free bridge; but of that, however, I am not positive, that is, of my return across the free bridge.

53d question (by same). Did you return in the day or night-time?

Answer. I am not certain, but my impression is that I returned in the day-time, as I was not in the habit of going to Manchester on business at night.

54th question (by same). Approaching the arch along 7th street, does the street bend towards Richmond or from Richmond?

Answer. It bends toward Richmond.

95 55th question (by same). In what position was your body when it came at rest on the fall as regards the railroad track, the wall of the arch, or any other points that you can recall?

Answer. I cannot tell, but I think I was parallel or nearly so with the railroad track. I was prevented by the darkness from seeing.

56th question (by same). Which was nearest the arch, your head or your feet?

Answer. I do not know.

Re-examined by counsel for plaintiff:

1st question (by G. K. MACON). About what was your weight at the time of your fall?

Answer. One hundred and eighty-seven pounds—thereabouts.

2d question (by same). What is the name of the street in Manchester which is the continuation of Mayo's bridge?

Answer. It is Hull street.

And further this deponent saith not.

O. A. ERICSSON.

STATE OF VIRGINIA,

City of Richmond, to wit:

96 I, M. L. Spottswood, a notary public for the city aforesaid, in the said State, do hereby certify that the foregoing depositions were duly taken, sworn to, and subscribed before me at the times and places mentioned therein, and I do further certify that the foregoing depositions were entirely written by me; that I am neither counsel nor attorney to either party, nor interested in the event of the cause.

Given under my hand this 28th day of June, 1878.

M. L. SPOTTSWOOD, *N. P.*

And after the introduction of the facts aforesaid and the deposition aforesaid, the defendant then moved the court as follows:

"Whereupon the defendant, by counsel, objected to said evidence as irrelevant, because on the said facts agreed the highway on which said accident is alleged to have occurred is not a public street of the city of Manchester which the said city is bound to keep in repair.

"And the defendant, by counsel, also further objects, on the same ground, to the introduction of all other testimony tending to prove that the alleged accident occurred on the said highway described in the said facts agreed."

And the court reserved judgment on said motion, and ordered the plaintiff to proceed with his testimony, and one Taylor having
97 sworn that, having the management of the carts belonging to the city of Manchester, he had, by order of the street committee, deposited by the use of said carts cinders over said arch and the approaches to said bridge to fill up holes along the same, and the plaintiff introducing other evidence not material to this bill, and having here rested his case, and the court then passing upon said motion of defendant to exclude, overruled the same for reasons stated in writing and herein inserted, as follows:

Opinion of the judge on defendant's motion to exclude, rendered 21st Feb'y, 1879.

For the purposes of this trial I am called upon at once to render a decision on this motion. Having to do so without opportunity of maturely considering the many authorities cited on each side, it will of course be without prejudice to the defendant if after trial, in the event of a verdict against it, it should move to set aside the verdict on the ground of misruling on the part of the court.

The city of Manchester and the city of Richmond are the corporators of the James River Bridge Company, and in about equal interests.

The work consists of a bridge over the James River, and of an elevated causeway from the southern edge of the river on the Man-
98 chester side, across the flats and across the Danville Railroad (which it crosses upon a stone arch), to the level of 7th street in Manchester, of which it and the bridge are an extension. The accident by which the plaintiff was disabled for life was a fall which he is alleged to have had at night from the parapet of the northern corner of the arch over the railroad down some fifteen feet to the ditch on the north side of the railroad. The bridge lies within the corporate limits of Richmond.

The causeway lies within the corporate limits of Manchester.

This highway was a joint undertaking of the two cities, under the act of assembly passed Nov. 5th, 1870, incorporating the James River Bridge Company. The commissioners incoporated by this act are mentioned as having been appointed by the trustees of Manchester. The city of Richmond, the county of Chesterfield, and certain townships of the county of Chesterfield were authorized to appoint like commissioners, and in that manner to become corporators of the company; so individuals were authorized to become so, but never did do so, and it was expressly provided that the authorities of Richmond, Chesterfield, and these townships should have control and authority over their respective commissioners, similar to that given to Manchester over its commissioners by the act.

99 Thus a public highway was provided to be built by two public municipalities, one county, and certain of its townships. In fact it was built by Richmond and Manchester.

The fact of its being a joint undertaking of one or more cities, &c., rendered it convenient to make use of the machinery of a corporation.

The adoption of such a method of action was not intended to and did not convert what was to be a public highway, belonging as such to public corporations, into the private property of a private corporation. If the cities had designed by such an expedient to escape the liability of keeping the public highway in safe condition, and their legal responsibility to the public for accidents caused by neglect to keep it in such condition, I cannot suppose that a charter would ever have been granted to them.

In its ownership, in its original object, and in its use, therefore, this bridge and causeway are a public highway, and the question raised by the defendant's motion is whether each city is responsible to the law for accidents and injuries happening on that part of this highway which lies within its corporate limits, or whether they are both liable as corporators in the Bridge Company?

I think this is in every sense a public highway. It was so in the original construction. It was in no sense (except in the mere
100 technical sense, that it was constructed by means of a corporation as an instrument) a private work.

No formal adoption of the bridge by Richmond, or of the causeway by Manchester, was necessary to constitute either a public highway. They were constructed by public bodies with public funds for public use as a public highway, ab ovo, and the formal adoption of them as a public highway would have been a useless and silly ceremony.

We are concerned in this case only with the causeway, and I think that that part of this highway is so completely and essentially a public highway of Manchester that it would be a gross wrong to deny to a person having a rightful claim for damages sustained on this public highway redress against Manchester, and to send him for redress against a corporation which Manchester and her copublic corporator were allowed to form merely as a more convenient mode of constructing this highway.

The motion to exclude evidence tending to show the liability of Manchester for the damages claimed by the plaintiff is therefore denied. To which ruling and judgment of the court the defendant excepted then, and prayed the court to sign and seal its said bill of exceptions; which is accordingly done. Witness my hand and seal.

RO. W. HUGHES, *Judge*. [SEAL.]

101 *Defendant's bill of exceptions No. 3.*

Be it remembered that on the trial of this action, after the facts were proven, which are set forth in the defendant's bill of exceptions No. two, and which are here referred to and made part of this bill, and after the evidence had been closed on both sides, and before the arguments of counsel were addressed to the jury, the defendant, by counsel, moved the court to give each one of the instructions following:

The court instructs the jury as follows:

1. If the jury believe from the evidence that the said place where the alleged accident occurred was not a public street of the city of Manchester, which said city was legally bound to repair and keep in repair, they must find for the defendant.

2. If the jury believe from the evidence that the place from which the pl't'ff alleges to have fallen is a part of the property of the James River Bridge Company, and that the city of Manchester had not at or prior to the time of the alleged accident acquired the same as a public street of said city, they must find for the defendant.

3. If the jury believe from the evidence that the said highway from
102 which the plaintiff alleges to have fallen is an approach to or an appurtenance of the James River bridge, belonging to and under the control of the James River Bridge Co., and that the city of Manchester has never acquired or accepted the same as a public street, they must find for the defendant.

4. If the jury believe from the evidence that the way in question *in question* was a street which the city of Manchester was bound to keep in repair, but that the plaintiff wandered away from the said street to some point not within the limits of the public highway, and from such point fell and was injured, they must find for the defendant.

5. If from the evidence the jury believe that the plaintiff knew of the existence and condition of the arch over the Richmond & Danville Railroad, and did not use due care in passing over it, in consequence of which want of due care the injury occurred, they must find for the defendant.

6. If the jury believe from the evidence that the alleged defect was such that a person using ordinary care and attention might have passed over the road in safety, and that the accident occurred as well
103 from the plaintiff's heedless or careless mode of travelling as from any defect in the construction of the highway, they must find for the defendant.

7. If the jury believe from the evidence that the officers or agents of the city of Manchester have on one or more occasions repaired the approach to the said bridge on the Manchester side and paved a part thereof, such action in making such repairs imposed no liability upon said city to keep the same in repair, and they must find for the defendant unless they further believe that the part of the said approach at which the alleged accident occurred was at the time a part of a public street of the city of Manchester, which said city was bound to keep in repair.

8. The jury are further instructed that notwithstanding the city may have been negligent, and the accident would not have occurred but for such negligence, still, if the plaintiff knew or had reason to know of the existence of the defect and could have avoided it by reasonable care he cannot recover.

9. If the jury believe from the evidence that the defective place might have been avoided or safely passed over by the exercise of ordinary care, then the failure so to avoid it or to pass over it is
104 negligence, and they must find for the defendant.

10. The jury are further instructed that the plaintiff cannot recover in this action if by the exercise of reasonable care he could have escaped the danger, and, if any negligence by the plaintiff contributed to the accident directly he cannot recover. And the jury may infer such contributory negligence from evidence that the place was not dangerous, that the defect was trifling, that it was obvious that no one else is proved to have stumbled or fallen there, or from any other fact tending to show that the plaintiff did not take the care ordinarily taken by others.

But the court refused to give said instructions, but the court in re

fusing to give said instructions substituted therefor and gave in lieu thereof the following charge and instructions, to wit:

There are three questions for the jury, namely:

1st. Whether a proper guard or protection had been provided at the point where the accident to the plaintiff occurred; if there was not—

2nd. Whether the accident was in consequence of the absence
105 of such proper guard or protection; and

3rd. If so, whether damage ensued to the plaintiff, and what amount of money shall be allowed as the measure of the damage to him.

If the jury believe from the evidence that a proper guard or protection to the highway was not provided; that the accident occurred in consequence, and that damage ensued to the plaintiff from the accident, then the court instructs the jury, that The City of Manchester is liable for the damage, unless it proves that the plaintiff sustained his injury through his own negligence or want of care.

The jury are also instructed that in considering damages in this case they may take into account any permanent future suffering and disability resulting to the plaintiff from the accident.

To which ruling of the court the defendant by counsel excepts, and prays the court to sign and seal this its bill of exceptions; which is accordingly done, as witness my hand and seal.

[SEAL.] RO. W. HUGHES, *Judge.*

106 *Defendant's bill of exceptions No. 4.*

Be it remembered that on the trial of this action there being testimony and circumstances in evidence tending to show that the plaintiff might by possibility have wandered from the highway and received his injuries by falling from a certain retaining or protecting wall at right angles to said highway at a point outside of and several yards from the limits of said highway, thereupon the defendant, by counsel, moved the court to give a series of ten instructions mentioned in bill of exceptions No. 3, and among them the following instructions:

4. INSTRUCTION No. 4.—If the jury believe from the evidence that the way in question was a street which the city of Manchester was bound to keep in repair, but that the plaintiff wandered away from the said street to some point not within the limits of the public highway and from such point fell and was injured, they must find for the defendant.

Which prayer for said instruction the court refused to grant in the manner set forth in bill of exceptions No. 3; to which ruling of the court
the defendant by counsel excepts and prays the court to sign and
107 seal this its bill of exceptions; which is accordingly done, as witness the following signature and seal.

RO. W. HUGHES, *Judge.* [SEAL.]

Defendant's bill of exceptions No. 5.

Be it remembered that on the trial of this action that both the facts and the testimony having been given to the jury as set forth in the defendant's first four bills of exceptions now referred to as part of this bill, and the court having refused to grant any of the instructions asked for by the defendant, and in lieu of all the instructions asked for by the defendant, and in lieu of certain other instructions asked for by the plaintiff charged and instructed the jury as set forth in bill of exceptions No. 3; to which action of the court in giving the said charge to the jury the defendant by counsel excepts, and prays the court to sign and seal

this his bill of exceptions; which is accordingly done, as witness my hand and seal.

RO. W. HUGHES, *Judge*. [SEAL.]

108 *Defendant's bill of exceptions No. 6.*

Be it remembered that on the same day on which, and immediately after the verdict of the jury was returned in this case, the defendant, by counsel, moved the court to grant it a new trial on the ground that the court had misdirected the jury as to the law of this case, on the facts and testimony as set forth in the defendant's several bills of exceptions heretofore filed, and the court having taken time to consider the said motion, on another day, to wit, on the 10th day of April, 1879, refused to grant the said motion for reasons stated in writing, filed in this action, and here inserted as follows: (The opinion of the court referred to has been heretofore inserted in this record at page 13; to which reference is here made).

To which ruling and judgment of the court the defendant by counsel excepts, and prays the court to sign and seal this its bill of exceptions; which is accordingly done.

RO. W. HUGHES, *Judge*. [SEAL.]

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify that the
109 foregoing is a true and complete copy of all the record and proceedings in the above-entitled cause as fully as they now exist in the records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 23d day of August, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the 104th.

[SEAL.] M. F. PLEASANTS, *Clerk*.

110 THE UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judge of the circuit court of the United States for the eastern district of Virginia, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between O. A. Ericsson and The City of Manchester, Virginia, a manifest error hath happened, to the great damage of the said city of Manchester, as by complaint appears: He being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington City, in the District of Columbia, on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the Supreme

Court of the United States, this 12th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

(Indorsed:) No. 1358. United States circuit court, eastern district of Virginia. O. A. Ericsson vs. The City of Manchester. Writ of error. To , Filed , 186 . , clerk.

111 UNITED STATES OF AMERICA, *to wit:*

To O. A. Ericsson, a citizen of the kingdom of Sweden and Norway, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein the said O. A. Ericsson is plaintiff, and The City of Manchester, a citizen of the State of Virginia, defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] RO. W. HUGHES, *Judge.*

112 I acknowledge legal service of the within citation.
April 18, 1879.

O. A. ERICSSON,
By G. K. MACON,
His Counsel.

(Indorsed:) No. 1358. United States court, eastern district of Virginia. O. A. Ericsson vs. The City of Manchester. Citation. Filed , 186 . , clerk.

113 Circuit court of the United States of America, ea. district of Virginia.

O. A. ERICSSON
vs.
THE CITY OF MANCHESTER.

Know all men by these presents that we, The City of Manchester, S. R. Owens, Sam'l D. Atkinson, E. B. Howle, J. W. Bronaugh, jr., T. M. Fendley, C. C. McRae, H. Fitzgerald, A. C. Gibbs, H. A. Jordan, C. W. Turner, James L. Robertson, R. E. Jones, J. A. Lipscomb, are held and firmly bound unto the United States of America in the sum of ten thousand dollars, to be paid to the said United States of America or assigns: to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 17th day of April, A. D. 1879.

Whereas the above-named The City of Manchester hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Virginia:

Now, therefore, the condition of this obligation is such that if the above-named The City of Manchester shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SEAL OF CITY OF MANCHESTER.	CITY OF MANCHESTER,	
	By J. R. PERDUE, *President of the City Council.*	[SEAL.]
	S. R. OWENS.	[SEAL.]
	SAM'L D. ATKINSON.	[SEAL.]
	E. B. HOWLE.	[SEAL.]
	J. W. BRONAUGH, JR.	[SEAL.]
	T. M. FENDLEY.	[SEAL.]
	C. C. McRAE.	[SEAL.]
	H. FITZGERALD.	[SEAL.]
	A. C. GIBBS.	[SEAL.]
	H. A. JORDAN.	[SEAL.]
	C. W. TURNER.	[SEAL.]
	JAMES L. ROBERTSON.	[SEAL.]
	R. C. JONES.	[SEAL.]
	J. A. LIPSCOMB.	[SEAL.]

Sealed and delivered in presence of—

114	JOHN PERRY.	[SEAL.]
	H. J. MENNALLY.	[SEAL.]
	J. R. PERDUE.	[SEAL.]
	ISAAC KAHN.	[SEAL.]
	A. MONTEIRO.	[SEAL.]
	AUGUSTINE ROYALL.	[SEAL.]
	H. E. DUVALL.	[SEAL.]

STATE OF VIRGINIA,
City of Manchester, to wit:

I, James M. Perdue, a notary public in and for the city of Manchester, and State of Virginia aforesaid, certify that J. R. Perdue (as president of the council of the city of Manchester), S. R. Owens, Samuel D. Atkinson, E. B. Howle, J. W. Bronaugh, jr., T. M. Fendley, C. C. McRae, H. Fitzgerald, A. C. Gibbs, H. A. Jordan, C. W. Turner, James L. Robertson, R. C. Jones, J. A. Lipscomb, John Perry, H. J. Mennally, H. E. Duval, J. R. Perdue, Isaac Kahn, A. Monteiro, and Augustine Royall, whose names are signed to the foregoing writing dated 17th day of April, 1879, each severally acknowledged the same before me in said city.

Given under my hand this 17th day of April, 1879.

JAMES M. PERDUE, *N. P.*

Approved.

RO. W. HUGHES, *Judge.*

April 18th, 1879.

A true copy.
Teste:

M. F. PLEASANTS, *Clerk.*

(Indorsed:) No. . United States circuit court, east. district of Virginia. O. A. Ericsson vs. The City of Manchester. Bond. Filed , 186 . , clerk.

(Indorsement on cover:) No. 242. The City of Manchester, Virginia, plaintiff in error, vs. O. A. Ericsson. E. Virginia C. C. U. S. Filed 13th September, 1879.

OFFICE SUPREME COURT U.S.
FILED
MAR 13 1882
JAMES H. McKEN

In Supreme Court of the United States.

THE CITY OF MANCHESTER,
Plaintiff in Error,
vs.
O. A. ERICSSON.

October Term, 1881.
No. 242.

Brief for the Plaintiff in Error.

P. PHILLIPS,
WM. A. MAURY,
C. C. McRAE,
For Plaintiff in Error.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

(Indorsed:) No. , United States circuit court, east. district of Virginia. O. A. Ericsson vs. The City of Manchester. Bond. Filed , 186 . , clerk.

(Indorsement on cover:) No. 242. The City of Manchester, Virginia, plaintiff in error, vs. O. A. Ericsson. E. Virginia C. C. U. S. Filed 15th September, 1879.

SUPREME COURT, U. S.
FILED
MAR 13 1882
JAMES H. McKENNEY

In Supreme Court of the United States.

THE CITY OF MANCHESTER,
Plaintiff in Error,

vs.

O. A. ERICSSON.

October Term, 1881.
No. 242.

Brief for the Plaintiff in Error.

P. PHILLIPS,
WM. A. MAURY,
C. C. McRAE,
For Plaintiff in Error.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

In Supreme Court of the United States.

THE CITY OF MANCHESTER,
Plaintiff in Error,

vs.

O. A. ERICSSON.

October Term, 1881.
No. 242.

Brief for the Plaintiff in Error.

The city of Manchester was sued by the defendant in error for injuries sustained by him in consequence of an alleged defect in a highway, in which, as he alleges, he was a passenger when injured.

The city denies liability on the ground that the place where the accident occurred was the exclusive property and under the exclusive control of a corporation styled the James River Bridge Company.

Statement.

Manchester is situated on the south bank of the river James, opposite the city of Richmond.

While it was a town, its trustees concluded that the public good called for the construction of another bridge between it and Richmond, and that this could be best attained by means of a corporation created for the express purpose. Accordingly, on the 5th November, 1870, an act was passed entititled "A bill to incorporate the James River Bridge Company." (P. R., pp. 16–20.)

By the 1st section of the act five persons are constituted "a body corporate under the name and style of the James River Bridge Company, and as such they shall have a common seal, and *have authority to sue and be liable to be sued.*"

After organization, these corporators were to be known as "the Board of Commissioners of the James River Bridge Company."

The Board (§ 2) are authorized to contract for the construction of a bridge "at any point from the corporate limits of the city of Richmond to *any* point on the opposite side of the river, either *at, above, or below the town of Manchester.*"

The trustees of the town are empowered to subscribe for the purposes of the act a sum not exceeding $500,000. (§ 4.)

On the opening of the bridge for travel, the Board of Commissioners are *directed* to lay tolls and appoint toll-gatherers and other agents. (§ 5.)

The bridge, "with the roads or streets leading thereto or therefrom, shall not be more than 80 feet wide; and the Bridge Commissioners are authorized to acquire by contract or by condemnation "the land necessary for the purposes of said bridge and its proper appurtenances, and no more" (§ 11), and this to the extent of opening "a new street or road either within or without the corporate limits of Manchester," which the Bridge Commissioners may deem convenient for the use of the bridge. (§ 14.)

The bridge, together with the land and appurtenances acquired under section 11 of the act, is to be bound for "any loans made to effect its construction;" and the lien for such purpose may be enforced by suit, and the bridge and appurtenances sold or leased for the satisfaction of the same. (§ 22.)

The Bridge Company, it is provided, "shall enjoy all the rights conferred, and be subject to all the liabilities imposed, on other bodies corporate by the statutes *and laws*

of Virginia, as far as applicable and consistent with this act." (§ 26.)

Afterwards, to wit: on the 7th December, 1870, and by virtue of §§ 16, 19 of the Bridge Company's charter, the city of Richmond became an equal subscriber with the town of Manchester to the capital stock of the company. (P. R., p. 14.)

On the 20th March, 1871, and before the work proper was begun, in any respect, the Bridge Company fixed the termini of the bridge by the following resolution:

"That the bridge to be paid for by the James River Bridge Company shall be considered as beginning at a point on the north side of the river, where a horizontal line extended on a line along the roadway shall strike the grade of 9th St., and *at the south end*, where a continuation of the same line will strike the present grade of the earth, south of the Danville Railroad; and the expenses of condemnation of land at the respective termini shall be paid for by the city of Richmond and the town of Manchester at the ends next their respective location." (P. R., p. 14.)

In order to secure access to the bridge at its southern terminus, and put it in communication with 7th street, in Manchester, it became necessary, as appears by the resolution fixing the location of the bridge, for the company to secure the intervening land, which it did by contract and by condemnation. Over the land thus acquired the company constructed a causeway, which involved throwing an arch over the Richmond and Danville Railway. The accident to the defendant in error happened at this arch, which was on a part of the land condemned, and some distance within the southern terminus of the bridge, (P. R., p. 15.)

At the time the land was condemned it was not within the limits of Manchester, but it was brought within them very soon afterwards by a law extending those limits *in all directions*. (P. R., p. 23.)

The town of Manchester was made a city by an act approved 20th March, 1874. (P. R., pp. 21, 22.)

It is agreed that the city has repaired, from time to time, that part of the roadway or street made by the Bridge Company, from the abutment of the bridge to a point beyond that where the accident occurred, and that the Bridge Company has made no such repairs at all. (P. R., p. 15.)

In this state of things the defendant in error, while walking from Manchester to Richmond, a very dark night, fell over a parapet of the arch, and sustained the injuries for which the suit is brought.

The evidence was mostly documentary, consisting of a case agreed, and the deposition of the defendant in error, read by consent. (P. R., pp. 12, 32.)

On the trial, the plaintiff in error moved to exclude the evidence of the defendant in error, on the score of irrelevancy, but the motion was denied and the ruling duly excepted to. (P. R., p. 33.)

The plaintiff in error further moved the Court to give the jury a series of instructions, which the Court refused to do, and in lieu thereof gave certain instructions of its own, to which the plaintiff in error excepted. (P. R., pp. 34–36.)

There was a verdict and judgment for the defendant in error for $5,500. (P. R., pp. 4, 5.)

Assignment of Errors.

The errors sought to be corrected by this writ of error are:

1. The denial of the motion to exclude the evidence of the defendant in error.

2. The refusal to grant the instructions prayed by the plaintiff in error.

3. The instructions given by the court.

Argument.

The great and controlling question in the case is that of the liability of the city.

While it is true that Manchester originated and promoted the project to erect the bridge, it is equally true that Manchester with a population of a little over 2,500, had no mind or ability to undertake the work herself, but sought and obtained for that purpose an external agent, a new corporation, whose individuality was as distinct from hers as it was from that of Richmond. But, aside from the inability of this small town to carry out so large an enterprise singlehanded, we cannot suppose that she intended to bear the burden of a work which might not reach her limits, and which was for the good of other and larger communities as well as herself.

It seems to have escaped the observation of counsel opposite, who recognize no difference between Manchester and the Bridge Company, that Manchester had in view an important object in asking the Legislature to commit the building of the bridge to a distinct corporation, namely, to attract the City of Richmond, the County of Chesterfield, the townships of that county, all having a common interest with Manchester in the proposed work, and private individuals to subscribe to the capital stock of the company, as appears by § 16 of the company's charter. And this was successful, for Richmond subscribed to one-half the company's capital stock and was admitted to an equal voice with Manchester in its management.

It cannot be denied that the Bridge Company was empowered and required to build a bridge fit for travel, and that the bridge, as located, could only be made fit for travel by constructing suitable approaches to it at both ends. Nor can it be doubted that these approaches, constructed as they were on land acquired by the company from private owners, became, as soon as built, integral parts of the bridge and as

absolutely the property of the company as the bridge, proper, itself.

The south end of the bridge was intended to communicate with 7th street in Manchester. But a considerable space, consisting of low ground, the property of private individuals, lay between the river bank, which was the terminus of the street, and the south end of the bridge. It therefore became necessary for the company to acquire this intervening land, and to build on it the approach or causeway connecting the street and bridge.

It is admitted that the accident, for which the action was brought, happened at the arch on which the company's causeway is carried over the Richmond and Danville Railroad. It was impossible, therefore, that the accident could have happened in a street of Manchester, for the place where it occurred was as much the property of the Bridge Company as any part of the bridge, and was liable to be sold or leased for the debts of the company under § 22 of its charter.

But, in the face of these incontrovertible facts, it is insisted that Manchester is as much responsible for an accident occurring through a defect in this causeway, as though it had occurred in any street opened and laid out by her.

Where municipal corporations have been held answerable at the suit of private individuals, it has been, without exception, in cases where they have omitted to exercise powers which it was their duty to exercise, or have exercised them in a negligent, improper manner. Hence, a very laboured attempt has been made to show that the causeway connecting the bridge with 7th street is a street of Manchester, which the city has the power to maintain, and is under a duty to maintain in a proper manner.

Upon the motion for a new trial the learned judge of the court below, in denying the motion, stated the grounds on which he placed the liability of the city in a somewhat

elaborate opinion, which will be found in the Record (P. R. pp. 9, 11.)

The cardinal question, whether the causeway is a street of Manchester or not, is disposed of by the court in a very summary way. Instead of resorting to the language of the Statute itself to find out what was intended by its framers, the court, assuming to do what it thought the legislature ought to have done, concludes that it cannot be supposed the legislature intended anything so unreasonable as to make so important a thoroughfare as the causeway "the private property of a private company," and thus discharge Manchester from the duty of keeping it in order. It is not pretended that the causeway would be any the less a highway for being the property of the Bridge Company. Why, then, it may be asked, would it have been unreasonable to make the company exclusively responsible for an accessory of the bridge—the causeway, and at the same time, entirely reasonable to make the Company exclusively responsible for the bridge itself?

But suppose the Company had concluded not to build the causeway, but to run the bridge to the point where the causeway joins the street, as it might have done, would the city have been responsible for the condition of so much of the bridge as was within its limits and ran where the causeway now stands? The mind cannot respond affirmatively to the question, and yet the reasoning of the Court requires such a response, unless there be a distinction in principle, yet unexplained, between a way over a bridge and one over an embankment. To such strange results are we conducted when we leave the words of the statute and enter the field of speculation! *Neminem oportet esse sapientiorem legibus.*

Now, as we have seen, the Bridge Company was authorized and expected (§§ 11 and 22) to be as absolute owner of the land acquired "for the purposes of said bridge and

its proper appurtenances," as of the bridge itself, and was authorized (§ 3) to build a bridge, not from Richmond to Manchester only, but "to *any point* on the opposite side of the river, either *at, above, or below* the town of Manchester." Suppose, now, the bridge had been built at a point above or below Manchester, and connected with some public road by a causeway, who but the company would have owned and been responsible for the condition of the causeway? The fact is, as has been already stated, that at the time the land for the causeway was condemned, it actually lay outside the limits of Manchester, and was afterwards brought within those limits when they were extended *in all directions* by an act already referred to.

The argument which the Court founds on the cases of *Barnes* vs. *The District of Columbia*, 91 U. S., p. 540, and *Bailey* vs. *Mayor, &c., of New York*, 3 Hill, 531 and S. C., 2 Denio, 433, only lacks application to make it complete. Before those cases can apply it must appear that the Bridge Company was merely an agency of the city of Manchester in constructing the causeway, and not an independent corporation, of which Manchester was only one of the stockholders; in other words, it must appear that the company formed a part of the municipal machinery of the city to carry out a work of the city. But no such view can be maintained, for, as we have seen, one of the objects in creating the company was to enable the city of Richmond, the county of Chesterfield, with its townships, and private individuals to subscribe to the company's stock, showing plainly that Manchester was not intended to have exclusive control over a work in which she was only partially interested. It was for the purpose of thus dividing the burden of the undertaking among those who were as much interested in it as Manchester, that the expedient of erecting a wholly independent corporation was resorted to.

To call such a company, one-half of whose capital stock

is held by the city of Richmond, and might have been in various other hands, a part of the municipal economy of the city of Manchester, is to do great violence to the terms of the statute.

It is extremely improbable that, if the creation of an agency merely was intended, so clumsy, we might say absurd, an instrumentality as a corporation would have been employed, or that the corporation, instead of the city, would have been given the power to sue and been made liable to be sued, (§ 1.) or that such corporation would have been admitted to all rights and subjected to all liabilities under the general laws regulating corporations, (§ 26,) or been allowed to acquire property and otherwise transact in its own name, and not that of its principal, the city.

If the causeway, which is but an accessory, is a work of the City of Manchester, the bridge, the principal thing, must be also, and so the city must be responsible at all times for the condition *of the entire work*—a conclusion which is wholly without support in the statute, and shocks common sense.

It is extremely incorrect in the brief of the defendant in error to say that the Bridge Company made or laid out a street in Manchester. All the company did was *to extend its bridge* to where Seventh street began—for the causeway is but an extension of the bridge, and it is just as improper to call it a street in Manchester as it would have been to call the bridge proper so if it had been extended to the street; and the resolution locating the bridge fully supports this view. (P. R., p. 14.) If the ground where the causeway stands had been required for piers to rest on, and a roadway been constructed on piers erected there, it seems to be admitted (brief, pp. 7 and 8) that such roadway would not be a street. But where is the reason of the distinction? We think it clear that the company's charter (§ 22) regards the approaches to the bridge as part of the bridge itself,

and the result of the argument on the other side is that the city should be held responsible for the condition of the property of the company, over which it has no control.

It seems to be supposed, on the other side, that the causeway was built under § 14 of the act, and not under § 11, supposing § 14 to be in this particular anything more than a legislative interpretation of § 11; but we think it clear that such was not the case, and that § 14 was intended to be operative only in case the bridge was located at a point on the south bank of the river, where no street or road led to it, or where the street or road leading to it was not of a proper width to make *a safe connection with the bridge*, which, by the way, is all that is meant by this power to widen any street or road, so much magnified by counsel opposite in their brief. But we do not conceive it would make any difference if the causeway should be held to have been built under § 14, for, certainly, if the company had opened a street or road on ground it had purchased, we should say it was as much the owner of the ground as of the bridge, and, furthermore, that the street or road was an appurtenance of the bridge, indispensable to its use, and chargeable to the same extent as any other property of the company, and that the company alone was responsible for its condition.

But it is said the causeway became a street of Manchester under § 24 of the city's charter, which provides that whenever a street, alley, or lane shall have been opened to, and used by, the public for the period of five years, the same shall thereby become as much under the authority of the city as if laid out by it; and, failing this point, it is further maintained that the causeway became a street by implied dedication. These points have no relevancy to the case at bar that we can see, and the judge of the court below so regarded them. The bridge and its appurtenances were as fully dedicated to the public use by the charter of the

company as any road or street could be, and there was no possible room for resorting to presumption in that behalf.

Nor shall we give any particular attention to the point, that the charter of the city has superseded or repealed, by implication, that of the company, in the article of the latter's control over the causeway, because, we conceive, there is no possible handle for saying that a power given the city over its streets can be held to wrest from the company, by implication, its power over, and ownership in, the causeway. To effect any such result, there must be an irreconcilable repugnance, in the particular mentioned, between the statutes, as this court has held time and again, whereas we have here two statutes that stand harmoniously together.

As to the authorities relied on in the opposing brief, as establishing that a city or county is not relieved of the duty to keep a given highway in order merely because some other body is charged with that duty, we deny their application to this case. The place where the accident occurred is the exclusive property of the Bridge Company, which is solely responsible for its condition in the same way as any other private proprietor is for the condition of his property.

The Bridge Company did not meddle with any street of Manchester. It built a causeway where no street had been ever before, and where there was no use for a street until it became necessary for the Company to construct one for its own purposes on its own land.

A fact much relied on by the other side is, that the Bridge Company has suffered the City to repair the causeway exclusively, but how the gratuitous services of the city in that respect can create a duty on its part to continue them indefinitely, we do not understand. On this principle, an individual who should keep in order the highway in front of his premises would thereby become liable to indictment

or suit for discontinuing his gratuitous contributions to the public good.

Having now shown, as we hope, that there is no support for the action against the city of Manchester, we submit that the judgment must be reversed, on the ground that the court erred in denying the motion to reject the evidence of defendant in error for irrelevancy (P. R., p. 33), and on the ground that the instructions given by the court (P. R., p. 36) were entirely erroneous.

P. PHILLIPS,
WM. A. MAURY,
C. C. McRAE,
For Plaintiff in Error.

MAR 28 1882

IN THE

Supreme Court of the United States.

CITY OF MANCHESTER, Plt'ff in Error,
vs.
O. A. ERICSON.

October Term, 1881.

Argument for Plaintiff in Error in Reply to Defendant's Brief.

IN THE

Supreme Court of the United States.

CITY OF MANCHESTER, PLT'FF IN ERROR,
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} October term, 1881.

Argument for Plaintiff in Error in reply to Defendant's Brief.

In addition to the opening brief for the defendant in error we submit the following specific reply to the several points made by the counsel for the defendant in their brief touching the defense of the non liability of the plaintiff in error as to the highway in question.

Statement of Case made by Defendant in Error.

On page 2 (of defendant's brief) it is stated that the Bridge Company condemned the place of the accident, "but that the purchase money was paid by the then town of Manchester."

It is proper to add, by way of explanation, that this payment was made by Manchester as a part of its subscription. Richmond became an equal subscriber with Manchester. Page 14, Record. The termini of the "*bridge*" [observe the language is not "*approaches*" or "*appurtenances*," or the like expressions] was established by a resolution of the Bridge Company before anything else was done. This resolution fixes the terminus *of the* "*bridge*" on the Manchester side, inclusive of and beyond the *locus in quo* of the accident (p. 14, R.) This point (the arch) and the heavy embankment leading from the wooden part of the structure, up to and inclusive of the arch, were costly appendages to the wooden part of

the brige, without which the wooden structure would have been useless.

The resolution, therefore, expressly declares and provides (p. 14 R) "that the *bridge to be paid for by the James River Bridge Company* shall be considered" as located between the above mentioned termini, adding (at bottom, p. 14), "and the *expenses of condemnation* shall be paid for by the city of Richmond and the town of Manchester at the ends next their respective locations." So the payment of condemnation money on the Manchester side was made by Manchester as a part of its subscription under this contract. *As to the cost of condemnation* only, the subscription of the two cities was, as a matter of convenience, to be adjusted in that way. The condemnation was made and the tilte acquired by the Bridge Company, which paid for the heavy cost of construction.

2. Brief of defendant in error then states (p. 2), with emphasis, that the charter was granted at the request of the trustees of the town of Manchester. The only foundation for this statement is that the 1st section of the charter of the Bridge Company recites that the corporators therein named "have been nominated by the trustees of the town of Manchester as suitable commissioners to represent the interests of said town."

3. The full text of section 11 of the Bridge Company's charter shows that it had plenary powers of acquisition as well by "*condemnation*" as by "contract."

Now we pass to the

ARGUMENT FOR THE DEFENDANT IN ERROR.

1. We concede that the special plea was properly rejected, because the defense set up by it was available under the general issue.

2. The defendant in error proceeds (on page 5 of his brief) to discuss the second assignment of error involved in the defense in the court below, on which defense the plaintiff is content alone to rely. The defendant urges six grounds of opposition to the validity of this defense.

The defendant proceeds to support his first proposition, viz: that the "Charter of the Bridge Company never intended that a street in Manchester should belong to the Company."

We submit that the passages in the bridge charter referred to (§ 1 and § 14), do not justify the inferences drawn from them. But if these inferences were true, we submit they are not even persuasive of the view contended for.

Despite the plain language of the charter, it is in effect urged that the Legislature could not, in its wisdom, have intended to give large powers and impose important duties on this Bridge Company, as to so much of its highway as should at any time lie within the corporate limits of Manchester.

The view we now oppose seems to be grounded largely on the idea that Manchester (or any city) must of necessity have control of all the streets within its limits, and must moreover be bound to repair them. While a city generally has control of streets within its limits, and is usually bound to repair them, *such power* and *duty* are not presumed to exist unless the statute creating the city give *the power* and *impose the duty*. The rule, as applicable to this subject, is tersely expressed by the court in *Barnes* vs. *District of Columbia*, p. 540 (on p. 544), as follows: "A municipal corporation is but a department of the State. The Legislature may give it all the powers it is capable of receiving, making it a miniature State within its locality. Again it may strip it of every power, leaving it a corporation in name only," &c.

In 2 Dillon on Municipal Corporations, § 1017, the conditions are stated necessary to render a city liable, the first being as follows:

"1. The place must be one which it is the duty of the corporation to repair.

"This duty, if not specially enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation."

If the city had ever had control of this street (which when opened by the Bridge Company was not in its limits) the Legislature had full authority to divest it of that control. *Barnes* vs. *District of Columbia*, *supra*. But we submit that the proof is, that this street never was under the control of the city of Manchester *at any time*, but was always under the control of the Bridge Company.

The plain language of the bridge charter cannot be set aside upon the ground that it would have been unwise in the Legislature

to give the Bridge Company the control of a highway within its limits.

But the assumption that this control given the Bridge Company over this highway is unreasonble is not sustained by the facts. On the contrary, we submit that powers over this particular highway as great, and even greater, than the powers given to the city of Manchester over its streets were unquestionably granted this company to the exclusion of any control by the city, and *wisely* so granted. Richmond was the capital and largest city in the State, and was accessible from the large neighboring rural districts on the South side, by but a single bridge other than railroad bridges, and that other bridge was a private toll-bridge. Manchester had at the time, as shown by the United States census, the small population of 2,599.

It is easy to infer that Manchester was totally unable to undertake, from its own resources, the cost of constructing this highway, and its importance to other large communities, both in Richmond and in the rural districts beyond Manchester, are considerations which furnish abundant reason for giving to the Bridge Company all the powers we claim for it. It not only had the power to *condemn* and open on the Manchesters side, as a part of its high way, whether in Manchester (or out of it), approaches eighty feet wide, but without the consent of Manchester, it was authorized to widen the streets in that (then) town, which were under its control. And it is contended this large additional power to control in a measure, the streets then existing and under the control of Manchester, is persuasive to show that Manchester (and not the Bridge Company) was intended to be clothed with the power to control and the duty to repair the highway which the Bridge Company condemned as a necessary appendage to its bridge. Correct reasoning, we submit, leads to the opposite conclusion.

If any such street in Manchester had been widened and an injury like the present sustained on the widened street, it is altogether unnecessary to determine where the responsibility would rest in such a case.

If we deemed it important to consider why powers were given the company over streets in Manchester, not conceded to it as to streets in Richmond, our inferences would be the opposite of those advanced on the other side.

The argument we oppose, it is submitted, involves a radical misconception of the spirit, as well as the letter, of the Bridge Company's charter, and ignores many of its most important provisions. It was a measure of general utility, intended to secure the cheapest available communication between the capital city and the country south of it, including Manchester. So far from taxing Manchester with the ruinous expense of constructing *or keeping in repair* the bridge, including the wooden structure and its costly approaches on the Manchester side, the most important provisions of the charter (not noticed on the other side) are carefully and deliberately designed to protect this small place against this destructive expenditure.

If other communities interested failed to subscribe, Manchester's subscription in that event was to be made good by tolls. In effect, in that event, Manchester was merely to lend the money to the Bridge Company, for construction and repairs, to be returned by tolls. A conspicuous object was to induce other communities to bear a reasonable share of the cost of this important undertaking. Every consideration repels the idea that it was intended as an agency of the town of Manchester.

Streets belong to the public, and not to the cities in whose limits they are. *Norfolk* vs. *Chamberlayne*, 29 Grat.

Among the numerous cases on this subject decided by this court, as well as by the State courts, we challenge (among the cases most adverse to the cities) the citation of one that does not place the city's liability on the ground that it *had control;* was *bound to repair;* and had the power to *command the means to repair.* See 2 Dillon M. C., § 1017.

State vs. *Mayor, &c., City of New Brunswick*, 1 Vroom. (N. J.), 395 is cited in defendant's brief (p. 7). It is expressly stated in that case that the city "has no right to regulate and grade the street so as to injure the Turnpike Company or to interfere with their chartered rights." It is not asserted that there was *any obligation* on the city to make the repairs.

The controversy was between the city and the land-owners assessed with the improvement. The Turnpike Company was not injured, and made no complaint; and the court therefore says: "When the Turnpike Company complains, their rights will be ascertained and protected." A case more directly apposite, de-

cided by the same court, is *Quinn* vs. *City of Paterson*, 3 Dutcher (N. J.), p. 35, wherein it is held: "If the authorities of a municipal corporation are authorized by an act of the Legislature to vacate, alter and relay streets or highways, such authority extends only to public streets or highways, and will not give authority to alter any road owned by a turnpike company or other private corporation."

The text of this case is commended to the consideration of the court as negativing the view of the court below in its opinion (p. 9, R.), wherein, for illustration, it refers to a turnpike road running into a city. Of course it is a begging of the question to assume that a turnpike road passing into or through a city is *ex necessitate rei* "a street of the city."

The effort is made (p. 7 of defendant's brief) to show a distinction between the "*bridge*" and its "*approaches.*" It is clear that the use of the word "bridge" in section 11, and the superadded expression, "streets and roads leading thereto and therefrom," define the whole as one highway. The company, by section 11, is authorized to acquire by purchase or condemnation the land necessary for the *bridge* and its appurtenances. The bridge and these approaches mentioned in the first sentence of this section (11) are both limited to a width not exceeding eighty feet, and the same powers of acquisition are given as to the entire highway. The superadded words (streets leading thereto and therefrom) relieve the question of all ambiguity. What is meant by "*bridge*" *is a question of fact* and not law, and must receive a large or limited construction according to the circumstances of each case. See *Birchett* vs. *New Haven*, 42 Conn. 174; *Commonwealth* vs. *Deerfield*, 6 Allen (Mass.) 449; 2 Dillon Mun. Cor., note 3 to § 728. If the word "bridge" alone had been employed, leaving it open to construction as to whether the approaches were included, we would even then upon the reason of the matter, fortified by the authorities just cited, insist that the question was exempt from doubt. Nothing we submit is plainer than that the mention made of the approaches was intended to put them upon the footing with the wooden part of the highway, which was more particularly described by the word "bridge." We have already shown that the Bridge Company in locating the termini of the bridge, adopted the word bridge alone, and established the place of the accident as a part of the "*bridge.*" (See Record, pp. 14 and 15.)

In this connection, the construction placed on § 12 (p. 8 of the defendant's brief) is clearly erroneous. In employing the expression, "*to let* the use of said bridge on such terms as may be agreed on to individuals or companies for fixed periods *in lieu of receiving from such persons or companies the ordinary rates of toll during such periods*," it was not intended to authorize a lease of the bridge or approaches, but simply to allow contracts for fixed sums to be paid in lieu of, and as commutation for tolls.

It is equally apparent, that the thirteenth section (found on page 18 of the record) is altogether misconstrued. That section plainly authorized the Company to construct the street railway over the bridge, and to *extend* it a certain distance through the streets of Manchester and over the roads of Chesterfield, without asking the consent of the authorities of either place. Yet the very liberality of these powers are again appealed to sustain the strange conclusion that there is some want of efficacy in the powers given to, and the duties imposed on, the Company as to the bridge and its immediate approaches laid out and constructed entirely by it.

Section 14 of charter (R. p. 18) commented on (p. 8 of defendant's brief), does not restrain, but enlarges the powers given as to the bridge and its immediate approaches by section 11.

It is said that the 22d section of the bridge charter fails to give any lien on the acquisitions of the company made under the 14th section, yet does give a lien on the bridge and its appurtenances mentioned in section 11, and the question is asked: "Why this discrimination?" We submit, no reasonable response to this inquiry can help the views held by the other side. The wooden structure and the costly embankment and arch (where the accident happened), all necessary to get to the bridge, are clearly works provided for in this 11th section.

Our view that the city of Manchester cannot possibly control this place or be under any obligations to improve it, is fortified by the fact that under this 22d section this place is so absolutely under the control of the Bridge Company, that it is authorized to create a lien on it. The learned judge in the court below concedes, without question, that under the charter of the Bridge Company the bridge and the causeway, including the arch over the Danville railroad, are all a part of the same work and stand on the same footing. See his statements in one opinion, pages 5 and 6 of

Record, and in the other opinion, on page 33 of Record. In the opinion on page 33 he says: "The work consists of a bridge over the James river and of an elevated causeway from the southern edge of the river, on the Manchester side, across the flats and across the Danville railroad (which it crosses upon a stone arch) to the level of Seventh street, in Manchester, of which it and the bridge are an extension." The view so elaborately pressed in the brief of opposing counsel, seeking to make a distinction between the bridge proper and the causeway where the accident occurred, is therefore discountenanced by the opinion of the court below.

It is said (p. 9 defendant's brief) that no provision is made in the Bridge Company's charter for repairs to any street in Manchester. Precisely the same provisions are made in regard to the causeway, that apply to the residue of the bridge.

The case supposed, in which the Bridge Company might widen an existing street in Manchester, in the exercise of its indisputable chartered rights, might give rise to the questions suggested by the other side, but the present case is free from any such doubt. The rights which the Bridge Company would have in the bridge and approaches constructed exclusively by it, might be different from those it would have over the pre-existing streets of the city.

The 2d proposition advanced by the defendant's counsel (pp. 9 and 10 of their brief) is that the 24th section of the charter of Manchester made this causeway a street. The application of this provision is clearly restricted to the opening of streets, lanes, &c., by private persons, and in cases where there has been an adverse use by the public. It could have no such application as to deprive another corporation of its rights, the use of whose highway by the public could not be adverse. The non-use *in our case* might destroy the franchise—but the public use, as long as the franchise exists, perpetuates the right.

3d. The third proposition is, that this causeway became a street of Manchester, "in accordance with the doctrine of dedication at common law," (pp. 10 and 11 of brief), Kelly's case, 8th Grat. 636 is cited, and a passage quoted. But the important principle stated in that passage, that dedication must precede acceptance, is totally overlooked. It is useless to consider whether the slight repairs placed by Manchester on this highway would involve *an acceptance* by the public, until some act of the Bridge Company, amounting

to *dedication*, is first pointed out. No semblance of such act can be shown!

In the case of *Cincinnati* vs. *Lessee of White*, 6 Peters, 438, cited on the other side, the evidence of dedication was clear and distinct. The owners laid off the land (now the city of Cincinnati) into streets and lots, and annexed thereto the common, which was the subject of controversy, and by their plan dedicated both the streets and the common to public use.

4th. The next point advanced is, "that the Charter of the City superseded that of the Bridge Company as to all powers over the streets lying within the corporate limits." The law is emphatically otherwise. "A statute will not be repealed by implication, unless the latter statute is so inconsistent with the first, that they cannot stand together, or the latter statute embraces the whole subject matter of the first." *Hogan* vs. *Guigon, Judge*, 29 Grat. 705.

To suppose that the important powers given this Company, in which other communities than Manchester were interested over its main highway, were repealed by implication in the Manchester Charter, is too unreasonable a proposition to be entertained.

5th. The next point is, that both, the company and city are liable. This is not a case of master and servant, or principal and agent, and the proposition here advanced ignores the ground on which liability, if existing, must rest, viz.: that the obligation or *duty* to repair, must, by law, be *imposed* on the party sought to be charged. The obligation, *if on the city, springs* only from the statute law, which brings the city into existence. The city never had any control of this highway, which only came into its limits after the highway had been fully established under the dominion of another corporation.

The City of Petersburg vs. *Applegarth's* adm'r, 28 Grat., 321, is inapplicable. The city of Petersburg owned the wharf where the injury was sustained, and was entitled to collect tolls. It held the wharf as private property.

The court took pains to distinguish the duty of the city in this case from the *public* duty pertaining to streets—placing the obligation upon the higher footing of a *common law obligation* growing out of the *private ownership* and control of the city, citing as authority the leading case of *Mersey Dock's trustees* vs. *Gibbs*, Law Rep., 1 H. of L., 93. If the Lower Appomattox Company (re-

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ferred to in the case of *Petersburg* vs. *Applegarth*), was bound, it was an independent obligation, growing out of the fact that both the city and the company had distinct powers and duties vested in them, each for its own benefit, in regard to the navigation of this river, one being a navigation company, and the other a wharf owner.

In our case the duty of the city as to streets is a *public* duty, required of it only in regard to such streets *in its limits* as it is bound by law to repair.

The case of *King* vs. *Inhabitants of Oxfordshire*, 10 Eng. Com. L. Rep., 310, was founded on the fact that the bridge was a part of a public highway, in respect of which a *common law liability* attached to the county. There is no common law responsibility *on municipal corporations* in respect to the repair of bridges within their limits. 2 Dillon Municipal Corp., § 728; and the *common law liability of counties* to repair bridges never prevailed in the *United States*. See *Ib.*, note 3 to § 728, on page 720.

Bailey vs. *Mayor of New York*, 3 Hill, 531, relied on by the court in its opinion, was a case in which the liability of the city of New York was placed on the ground that the work itself was not one of a public nature, but intended for "the private advantage of the city," and that the commissioners who superintended the work, though appointed by the State, were yet the agents of the city. The city accepted this agency with full authority to refuse it. The work was contracted for with the approval of the city, the cost paid by the city, and the benefits, including the right to collect water rents, were exclusively enjoyed by the city.

The sixth point (p. 16 brief) is that the city, by repairing this highway, treated it as one of its own streets. In our opening brief we noticed this position. If authorities are wanted to show that voluntary repairs create no obligation, we refer to *Goodrich* vs. *Chicago*, 4 Biss., p. 18, (United States Circuit Court, Illinois, 1864); *Scott* vs. *Des Moines*, 34 Iowa, 552.

C. C. McRAE,
Of counsel for plaintiff in error.

JAN 13 1882

IN THE

Supreme Court of the United States.

CITY OF MANCHESTER
vs.
ERICSSON, O. A.

Brief for Defendant in Error.

MEREDITH & COCKE,
G. K. MACON,
COUNSEL.

IN THE

SUPREME COURT OF THE UNITED STATES.

CITY OF MANCHESTER vs. ERICCSON, O. A.

This cause is here upon a writ of error to a judgment of the Circuit Court of the United States for the Eastern District of Virginia.

STATEMENT OF CASE.

O. A. Ericcson, a foreigner, who had never been naturalized, was on the first day of April, 1878, a resident of the city of Richmond, Va.; that on the evening of that day he went over Mayo's bridge to the city of Manchester, that lies on the south side of James river, opposite Richmond; that he spent the evening there with a friend, Judge William I. Clopton; that he started to return home about 10 o'clock P. M. by way of a bridge known as the "Free Bridge;" that in approaching said bridge he passed along Seventh street in said Manchester; that while passing along that street he inadvertently fell or stepped over the small wall that runs along that part of said Seventh street, where it is *undercut* or pierced by the Danville railroad, as alleged in the declaration; that he was thereby greatly injured and hurt, and thereupon brought the suit, now before the court against the city of Manchester, and recovered therein in the court below the sum of $5,500 as damages for said injuries. Among other facts the record shows that the said wall at and about the place where the said Ericcson fell or stepped over, varies in height from six to twelve inches; that the land on which was raised or embanked that part of Seventh street, which lies between the eastern end of said

small wall and said "Free Bridge" (and which includes the place of the accident), was condemned by a certain corporation known as the James River Bridge Company; but that the purchase money therefor was paid by the then town of Manchester; that the said James River Bridge Company was chartered in 1870 "to contract for the construction, or cause to be constructed a bridge, &c.;" *that the charter was granted at the request of the trustees of the town of Manchester.*

By section 11th of said charter, it was provided, "said bridge, with the roads or streets leading thereto or therefrom, shall not be more than eighty feet wide. Said board of commissioners are authorized to *acquire* by contract the land necessary for the purposes of said bridge, and its proper appurtenances, and no more," &c., &c.

By section 12th: "Said board of commissioners are authorized to let the use of said bridge on such terms as may be agreed on," &c., &c.

By section 14th: "The right of condemnation or purchase shall apply to the opening of any new street or road either within or without the corporate limits of Manchester, in the county of Chesterfield, or for the widening of any existing street or road, which may be deemed by said commissioners convenient for the use of said bridge, or railway."

By section 22d: "The bridge constructed under this act, together with the land and appurtenances acquired under *section 11th* of this act, shall be bound, without any written mortgage, pledge, or security, other than this act, for any loan made to effect its construction."

It further appears that the proceedings for the condemnation of the land on which the street was raised or embanked, was begun on February 9, 1871, and concluded March 14th, 1872; that on March 22d, 1871, the corporate limits of Manchester were extended until they included that part of the said street that now lies between said arch and said bridge; that the town of Manchester became by charter on March 20, 1874, the city of Manchester.

That on September 9th, 1873, the trustees of the town of Manchester adopted a report as to what should be the grade of that part of said street lying between the arch and the said bridge; that on June

26th, 1874, the Council of the city of Manchester adopted a report of the committee on streets as to certain outlays and expense in paving, filling up, and repairing said street up to and beyond the place of accident, in the direction of said "Free bridge"; that the paving was ordered to be done by the proper authorities of the city of Manchester, and said work was paid for by said city.

That that part of Seventh street had always been open to the public ever since it had been opened, which occured six or seven years ago; that the said company had never, since it was opened, improved or repaired said street in any way whatever, except they built a small house on the south side of said street adjoining the bridge at their own expense; that the city of Manchester had repaired, from time to time, the highway extending from the abutment of the bridge to a point beyond where the accident occurred, and in the direction of the bridge.

It further appears from the record that the city of Manchester has by her charter the right and power "to close or extend, widen or narrow, lay out, graduate, curb and pave, and otherwise improve streets, sidewalks and public alleys *in the city*"; that the city has power thereunder to abate all nuisances.

As to Assignment of Errors in Record.

The record shows that the plaintiff in error filed in the court below six bills of exceptions; and as, perhaps, the same points will be insisted on in this court, we will notice them all. They are as follows:

1st. This first bill was filed to the decision of the court refusing to allow a special plea that was offered by the appellant to be filed.

2nd. To the decision of the court, that the said Seventh street was, at the time of the accident, a public street of Manchester, and that the evidence introduced to prove the accident was relevant.

3rd. To the decision of the court refusing to give the instructions asked for by the plaintiff in error.

4th. To the court refusing to give the 4th instruction.

5th. To the court giving the instructions it did give.

6th. To the refusal of the court to grant a new trial.

ARGUMENT.

The above points will be noticed in the order in which they are stated.

I. The special plea that was rejected by the court was, in purport and in substance a statement that Manchester was not liable to Ericcson, because the street or highway where the accident happened, was not a street of that city, but was a highway belonging to the James River Bridge Company and that it was never subject to the control of said city.

It must be remembered that at the time this special plea was offered, the city had already plead the general issue; which, of course, negated the material averments in the declaration. Now the declaration necessarily charged that the said street was a street belonging to the city, and which the city was bound to keep in repair. Therefore the general issue had put in question the same fact involved in the special plea, and had called on the plaintiff below to prove the allegation. And further, this was a duty that the nature of the case threw upon Ericcson. Hence, it is evident that the said special plea was but a repetition, in fact, of the general issue. It only called on him to prove what it was his duty to prove, and it was only a second call as to which proof had already been demanded by the plea of "not guilty." Such being the fact, the court properly rejected the plea, for "the multiplication of issues by special pleas tends to embarrass the jury, and ought not to be encouraged, except in cases where, by law, the defence would otherwise be excluded or rendered unavailing."—Fant vs. Miller, 17 Grat., 67.

In that case the court said, speaking of a special plea, "That defence, however, might have been made, as, in point of fact, it was made, under the plea of *nil debit*, upon which issue had already been joined in 1853. The plea was, therefore, wholly unnecessary, and this would have been good ground for rejecting it, when offered, if it had been objected to; Reed vs. Hanna's ex'ors, 3 Rand 56; and it was competent for the court to strike it out after it was raised, even

though issue had been joined upon it; Kemp vs. Mundell, 9 Leigh 12. The plaintiffs in error not having been deprived of any defence by the striking out of this plea, have not been injured by it, and can not complain." Such is the law of pleading in Virginia. See also 14 Grat. 454; 8 Leigh 537. The court below properly followed the State decisions. Phillips, &c., vs. Seymour, &c., 1 Otto 655. But in Van Ness vs. Forrest, 8 Cranch 30, 31, this court announced the same doctrine.

But again the plea was properly rejected, because it did not set up a thorough defence. Everything alleged in the plea might have been admitted, and yet the plaintiff would have been entitled to recover This can be seen from a reading of the court's opinion as to the nature of the highway, and the duties of Manchester in regard thereto. If this be true, no injury was done the said city by rejecting said plea. And hence the case will not be reversed on this ground. 1 Wal. 519, 21 Wal. 294. As the question of the extent of this defence is involved in the second supposed assignment of error, we will not argue it here, but pass on to the said second assignment.

II. The said second assignment raised the question, who was the owner of the street, and whose duty was it to keep it in repair.

It is true that the embankment that forms that part of the street between the "Free Bridge" and the place of the accident was put there by the James River Bridge Company—that the land upon which it was put or raised was condemned by said company; though paid for by the then town of Manchester. But on the other hand we insist, that the lower court properly held that Manchester was liable, for the following reasons:

1st. Because the charter of the Bridge Company never intended that a street in Manchester should belong to the company; or

2nd. Even if it originally belonged to the company, it afterwards became a street of Manchester, by the 24th section of the city's charter; or

3rd. Because it had become a street of the city by dedication; or

4th. By the charter of the city being subsequent to that of the company; or

5th. Because even if the company was liable, yet the city was also; or

6th. Because it was too late for the city to say that it was not a street of the city.

It should be noticed that the charter for the Bridge Company was asked for by the town of Manchester. The first section reads as follows:

"Be it enacted by the General Assembly that William G. Taylor, William I, Clopton, James M. Moody, C. C. McRae, and Erasmus Gary, who have been *nominated by the trustees* of the town of Manchester, &c.. &c., are hereby constituted, &c., the James River Bridge Company," &c.

In the view of the above language, it cannot be denied that whatever powers were granted said company, were given with the consent and at the request of said city, then being a town. So that any burden that may have been put upon Manchester in the way of new streets, was done at her request. There can then be nothing strange or objectionable in the Legislature granting to this bridge company the right and power to lay out streets in Manchester.

And the willingness of that town to have this power lodged in the bridge company, will be seen from the reading of the 14th section of the company's charter, where power is granted to the company to widen "any existing street or road."

And it is also deserving of notice, that no power is given to make or widen any street in Richmond—but only in Manchester. Can it, in view of the above, be denied that Manchester ought to be as responsible for any street opened within her corporate limits by the said company, as if she herself had had it done by her own officers or employees. Can it be that a municipal corporation can avoid all responsibility as to her streets by asking that another corporation may have the power to open her streets, or to widen them—and, as in this case, no provision be made for repairing or improving said streets. We submit that the law does not favor a corporation retaining and enjoying the benefits of a power, when it attempts to avoid and shirk the corresponding responsibilities. Benefits and responsibilities are the *Siamese twins* of corporative creation. They are inseparably attached. The one cannot exist without the other.

We think that the correct principle is, that where a *street* is made within a city, under a power granted to another corporation at the city's request, that the city is just as much responsible as if she, by her own officers, had made it; that the act of the other corporation will be regarded as only an act of an agent of the city. 1 Vroom (N. J.) 395-97. In that case a turnpike had been laid through the city and not at the city's request, and yet the court held that the city has, "for police purposes, the authority to make such municipal regulations as they deem expedient."

And such, we submit, ought to be the decision of this court in this case, unless there be some special provision in the charter of the bridge company to prevent. But there is nothing in the charter of that nature. On the other hand every section pertaining to this question favors the legal principal for which we contend.

The object had in view when Manchester asked that the charter be granted, was the building of a bridge across James river. Every thing else asked for was subordinate to that. The town of Manchester did not intend to seek, by the charter of the company, to be relieved of her duties and responsibilities as to her streets. Surely, then, she ought not to be relieved unless her charter admits of no other construction. That the charter does admit of another construction is seen from the language of several of its sections. A reading of the charter will show that a clear distinction is drawn therein between the bridge and the streets leading thereto.

In the eleventh section the language is, "said *bridge*, with the *roads* or *streets* leading thereto or therefrom, shall not be more than eighty feet wide." Here is no confounding or blending of the streets with the bridge. They are regarded and spoken of as separate and distinct.

After having drawn the above distinction between the "bridge" and the "roads or streets," the same section goes on to show what land the said company may hold. It says, "Said board of commissioners are authorized to *acquire by contract* the land necessary for the purpose, of said bridge, and its *proper*, *appertenances* and *no more*," &c., &c. Surely the word "appurtenances" will not be so magnified as to include "streets." No, it was only intended to embrace the land needed

for the erection of piers and such appurtenances. A street was never yet called an appurtenance to a bridge.

That so extended a meaning was not intended to be given to that word, can be more readily assured by a reading of the 12th section. In that section the "said board of commissioners are authorized to let the use of said bridge, on such terms as may be agreed on, to individuals, or companies," &c., &c. Could it have been intended that the streets of a town or city might be "let" "to individuals or companies." The absurdity of the idea negates its probability.

Again: The 13th section strengthens our position, that it was not intended that the bridge company should own any street or road, although it might be the instrument of its creation. For this latter section speaks of horse cars being run over the bridge—over the streets of Manchester—over the roads of Chestsrfield; but says nothing of any street or road of the bridge company. Is not this a recognition of the fact that the bridge company owned no street or road. Otherwise some mention of such ownership would have been made in this section.

But if further argument be needed to establish our position, we suggest a reading, in connection with each other, of the 11th, 14th, and 21st sections. As much of these sections as is needed is quoted in our statement of facts.

It will be seen thet the said 14th section allows the company only to *condemn* land for the purpose of making a street in Manchester, or a road in Chesterfield county. And when the street or road is made, the one or the other immediately becomes a street of Manchester or a road of Chesterfield county, and all power over it passed from the company, unless it be to widen it. This may be conclusively seen from the fact that the 22d section does not give any lien on the land acquired under the 14th section, for streets or roads; but only gives a lien on "the bridge constructed under this act, together *with the land* and appurtenances required under *section 11th*." Why this discrimination? If the street or road created by the company belonged to the company, why was not the land subjected to the lien created by the act? Why this partiality? If the street could have been charged with the lien, why was it exempted? Not because it was a thoroughfare,

for the bridge would also have been exempted on that ground. If the street had been the property of the company, it too would have been mortgaged. But we find that it was not covered by the lien, and hence must conclude that it was not intended that it should belong to the company.

And indeed no where in the company's charter is any provision made for the management, repair or ownership of any street opened in Manchester by the company. And it was proper that no provision should be made, for a street opened in Manchester by another corporation *at the request* of Manchester, became in all respects a street of Manchester.

No doubt will be entertained that this is the proper construction to put on the charter, if it be remembered that by the said 14th section the company could not only open a street, but could also *widen* any existing one to the extent of eighty feet.

Suppose that the bridge company deemed it necessary and undertook to widen a street in Manchester then only forty feet wide. Imagine that she had added forty feet more to the right or left of this forty-foot street, or imagine that she had added twenty feet to one side and twenty to the other. To whom would such a street belong? Would there be, if we may so express it, a composite ownership? The bridge company master of the right—Manchester undoubted owner of the middle—and again the bridge company having the title to the other flank. So absurd a ~~verdict~~ assures the incorrectness of such a construction. We therefore submit that the said Seventh street, from the eastern end of the said small wall to the Free Bridge, was a public highway; a street belonging to and controlled by the city of Manchester.

2d.

Should it be admitted for argument sake, that the street originally belonged to the company, yet it afterwards became a street of the city by the operation of the 24th section of the city's charter. That section reads as follows: "Whenever any street, alley or lane in said city shall have been opened to and used as such by the public, for the period of five years, the same shall thereby become a street,

alley or lane for public purposes, and the council shall have the same authority and jurisdiction over, and right and interest therein as they have by law over the streets, alleys and lanes laid out by them," &c.

Had this street been in public use for five years? W. M. Woodward, a member of the board of trustees of the bridge, testified that it had "always been open to the use of the public ever since it has been opened, which occurred 6 or 7 years ago." This was uncontradicted. It was a fact. Then the only question is whether it is necessary for it to have been in public use five years after the granting of the city charter, or whether the time during which it had been in public use, while Manchester was a town, can be computed in ascertaining whether it had been in public use for the required time. We submit that the latter is the correct view.

The first section of the city charter gave to the city "all the rights, immunities, powers and privileges" to which the town had been entitled. The lapse of time needed to prove a dedication had begun to run in favor of the town, and to that right the city succeeded. Suppose that the twenty-fourth section had not been passed, and the city had been in possession nineteen years. Had a question of dedication arisen, the time during which the town had used it would have been added to the time the city had used it. Now the 24th section was only intended to shorten the period of use generally required to support the claim of dedication. It was not intended to obliterate the right that the city succeeded to from the town. It does not say that the five years shall begin to run from the granting of the charter. Its meaning is, that whenever it shall happen or occur after the granting of this charter that a street has been in public use for five years, then it shall become a street of the city--no matter when the five years began to run. So we submit that, as the street had been in public use for 6 or 7 years prior to Ericeson's injuries, it was at that time a street of the city.

3d.

Again we submit that even if the said highway did not become a street of Manchester as soon as opened to the public, yet it became such prior to the injury to Ericeson in accordance with the doctrine of

dedication at common law. As to when a street accrues to a municipal corporation by the principle of dedication has been before the court of appeals of Virginia several times. In Kelly's case, 8 Gratt., 636, the court says, "It is clear there must be not only a dedication, but an acceptance of the road. What is an acceptance, &c., &c.? To guard against this uncertainty and litigation, the right of acceptance ought to be vested in some public body. As we think that by the laws of this State this right is vested in the county courts, &c., &c. We do not mean that there must be a formal acceptance entered on the records of the court. *Any entry shewing that the court regards the road as a highway will be sufficient*, &c. &c. We desire it to be understood that this opinion applies to roads in the country only and *not to streets and alleys in towns*. As to them *the acts of the corporation officers* may have the same effect, as the acts of the county courts."

And again in Harris' case, 20 Gratt., 839, the court said, "It may be safely assumed, that in this State there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town." These cases are referred to with approval in City of Richmond vs Stokes & Co., 31 Gratt., 716. Governed and guided by these authorities one must hold that the highway became by dedication a street of Manchester. For the facts in this case show several *entries* by the city council proving that the city regarded the place as a public street. She did several distinct acts of recognition in repairing and improving said street. The trustees of the town of Manchester in their report of Sept. 9, 1873, recommended that the street be improved, &c., from the bridge to Perry street," (see record, p. 13.) See also on the same page the report of June 26th, 1874, of the committee on streets of the council of the city of Manchester, reporting payment for certain repairs and improvements on said 7th street between bridge and eastern end of the wall over the railroad arch. Woodward testified "that the city of Manchester had repaired from time to time the highway," &c., &c., These facts bring this case within principle announced in the cases above quoted. The agreed facts show acts of recognition and acceptance by both the town and the city of Manchester.

Nor are we, in insisting that the said highway became a street of Manchester by dedication, running counter to any decision of this court. We are in truth but applying the doctrine as announced by this court in Cincinnati vs Lessee of White, 6 Peters, 438, where it was held that "the right of the public in such cases does not depend upon a twenty years possession. Such a doctrine applied to public highways and the streets of the numerous villages and cities that are rapidly springing up in every part of our country would be destructive of public convenience and private right." See 3 Bing 447, 2 New Hamp., 513, 5 Barre and Ad., 469.

4th.

Again, if it was not a street of Manchester originally, it became such as soon as the charter of the city was granted. We submit that the charter of the city superseded that of the Bridge Company as to all power over the streets lying within the corporate limits. In support of this we refer the court to the case of the town of Ottawa, &c., vs Walker et al, 21 Ill., 605-609. The facts in that case show that the county in which the city was located attempted to impose on the citizens of the corporation a tax, in order to make a highway. But the court after citing the provision of the city charter granting power to the city over its streets, said, "when the charter was granted to the city, there can be no doubt that it was the design of the Legislature to confer this power upon the city authorities. The language will bear no other construction. And when it was thus conferred, it deprived all other bodies of its exercise. Its exercise is repugnant to that of other authorities, and by implication repealed all other legislation on the same subject, the exercise of which would be repugnant to the power granted to the city. And so much of the act creating township organization was thereby repealed."

Following the principle above announced we can well claim, that by the city charter it was intended that the city authorities should have exclusive jurisdiction over all the streets within its corporate limits; and to this extent "repealed all other legislation on the same subject," if any existed. Hence it follows that if the bridge company had any power under its charter over the highway in question,

that power was revoked by the charter granted to Manchester subsequently.

Another case—and it is one deserving of weight as an authority—is the case of ——— 104 Eng. Com. Law reports, (12 Com. Bh. N. S.) p. 161.

We quote the syllabus of the case as it contains both an accurate statement of the facts involved, and a correct epitome of the principle established therein. It reads, "The 145th section of the city of London Sewers, October, 1848, (11 & 12 Victo, clxii) as to the naming and numbering of houses in the city of London, is repealed by the general provision for that purpose contained in the Metropolis Local Management Act, October, 1855, (18 and 19 Vict., chapter 120, sec. 141).

Where two statutes give authority to two public bodies to exercise powers which cannot consistently, with the object of the legislature, coexist, the earlier must necessarily be repealed by the latter statute."

5th.

We come now to the proposition that both the company and the city are liable. If this be true, it does not properly lie in the mouth of the city to object because we elected to sue her. We merely exercised a legal right—the right of electing whom we preferred to sue.

The place is undoubtedly a public highway—a street in Manchester. It may be that it belongs to the Bridge Company, and that it was also the Bridge Company's duty to repair. Yet that fact would not relieve the city of her *common law liability* to repair. Nor was she relieved of that common law duty, because she had assumed another, as half proprietor in the Bridge Company. This has been so decided by the court of last resort in Virginia. We refer to the case of City of Petersburg vs. Applegraph's administrator, 28 Grat. 321. The facts of that case show that a vessel belonging to Applegraph, while lying at a wharf belonging to the City of Petersburg, was injured by a sunken pile in the Appomattox river. The court in fixing the liability said, on p. 345, "Nor can it make any difference that it has been made the duty of the Lower Appomattox Company to dredge

and remove obstructions from the river at and below Petersburg, under the act passed December 8, 1824, &c. It seems that the city is now in effect the Lower Appomattox Company, owning all the stock of that company, and electing its directory, which company therefore is *a mere agency of the city.* But even if it were a separate and independant organization, its obligation to perform a duty *which the city is also bound to perform on common law principle, would not relieve the city* from its common law liability for the non-performance of such a duty. If so, a party affected by the neglect of such duty might be injured by the substituted liability of the company.

Nor can it make any difference that the United States have made appropriations to the improvement of the navigation of the river, and have occasionally dredged it. While such operations are beneficial to the city, they do not relieve it from its common law liability in regard to the city wharf."

This case we regard as decisive of the proposition that the city is liable whether the Bridge Company is or not. The only difference between the case we cite and this one is, that in the former Petersburg owned all the stock of the company, and here Manchester is half owner. We think that this difference makes the liability of Manchester only the more obvious; for surely, it was never intended that the city of Richmond (the other half owner), should have any authority over the streets of Manchester.

The English authorities and the decisions of other States fully sustain us in our position that, while the Bridge Company may be liable, yet the city is also liable. In truth, the principle is that the city is *primarily* liable.

In 10 Eng. Com. L. Rpts, p. 310, is given only a syllabus of the case of The King vs. the Inhabitants of Oxfordshire. But the case has been cited time and time again as announcing the correct doctrine on this subject. The syllabus reads: "Indictment against a county for not repairing a bridge in a public highway. Plea, that by a certain act of parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees under and by virtue of that act, and that the trustees were liable and ought to repair. Replication,

that the trustees were not liable to repair. Held, that the bridge being built for public purposes in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built, and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge.

Semble, that if that fact had been averred and proved, *still the county would have been primarily liable*, and must have taken their remedy against the trustees."

This authority establishes the doctrine that in order for a county to be relieved of its duty to repair the public roads, on the ground that another authority has been appointed by the government to perform that duty, it must *at least* show that the other authority has sufficient funds to repair. Surely such a doctrine must apply with at least equal force to streets in a city.

Now, in this case, nothing as to the bridge company's ability to pay was averred or attempted to be proved. And we may here notice in passing that the want of such averment in the plea is a sufficient ground to justify the court in rejecting it. And as to any proof we have only the statement of Mr. Woodward. who testified that the bridge company had never repaired the street since it was opened,and that Manchester had from time to time repaired it. These facts bring this case fully within the doctrine of the English case just cited.

There is an earlier English case than the one quoted,establishing the liability of counties for defective highways. It is the case of The King vs. West Riding of Oxfordshire, 2 East 241, decided in 1802. There it was held that "the county or riding is liable to the repair of a bridge built by trustees under a turnpike act, there being no special provision for exonerating them from the common law liability, or transferring it to others, though the trustees were enabled to raise tolls for the support of the roads."

See also Rex vs. Yorkshire, 5 Burrows 2594-2597; Meadville vs. The Erie Canal Co., 18 Penn. St. Rpts. 66-68.

In a later case from Pennsylvania, the court cited with approval the case of King v. Oxfordshire, and held that "it is no sufficient

answer to a writ of mandamus, commanding the authorities of a borough to repair a street within its boundaries, that another authority had undertaken to keep such street in repair; unless they show that there is a functionary, who has funds in his possession or power which he is bound to apply to that purpose." Uniontown vs. Commonwealth. &c., 34 Penn. St. Rep. 293.

See also State vs. Town of Compton, 2 N. H. 513; Willard vs. Newberry, 22 Vert. 498–464; Currier vs. Cowell, 16 Pick. 170.

In the lower court the counsel for the city cited certain cases as opposing those above referred to, and as relieving their client from all liability. The cases cited were the King vs. Kerrison, 3 Maule & Sel. 526; The King vs. Kent, 2 Maule & Sel. 513; The King vs. Kent, 13 East 220, and The King vs. The Inhabitants of the Parts of Lindsay, 14 East 318.

We assert that only a slight examination of these last mentioned cases will satisfy the court that they all turned upon the fact that the highways had been constructed by *private corporations for pecuniary profits*, and that for that reason are not applicable to this case, nor opposed to the authorities we have cited as deciding the point under discussion in our favor.

We have not commented upon the case of Bailey vs. Mayor, &c., of New York, 3 Hill 531, and S. C. 2 Denio 433, nor that of Barnes vs. The District of Columbia, 1 Otto 540. Because we cannot add anything to the strength with which the learned judge in the lower court applied them. See Record, pp. 9 and 10.

6th.

And again: Suppose that this court should be of the opinion that the street was not at first a street of Manchester. Yet we submit that if satisfied from the facts that the city treated it as one of its streets, repaired it as such for public use, then it will hold that it was too late after the injury to Ericcson to deny ownership, and attempt to prove that the responsibility lay in its original owner. After having treated it as a street—after having by its acts induced persons to believe that it was one of its streets, the city was estopped from denying its ownership. It could not be permitted, after Ericc-

son had been injured, to tell him that he was mistaken; and that while the mistake arose from its acts, yet he must go to work to find out the real owner, and sue him. The injustice of allowing such an escape has been recognized and deprecated by this court.

In Mayor vs. Sheffield, 4 Wal. 189, the facts are stated somewhat as follows: The council of New York authorized that the lower corner line of the Park be so adjusted as to make a curve instead of corners and angles; that the place where the accident to the plaintiff occurred, was formerly a part of City Hall Park, the property of the city of New York, but that the execution of the order of the council brought the said place into the street, and it became a part of the sidewalk at that point. In the suit the city contended that the place of the accident was not a part of a street; that the authorities had no right to turn a part of the park into the street, as the park was pledged for the city's debt, &c. In answer to that defence this court said, on p. 194, "If the authorities of a city or town have treated a place as a public street, taking charge of it, and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation can not, when it is sued for such injury, throw the party, upon an inquiry into the regularity of the proceedings by which the land became a street, or into the authority by which the street was originally established." Relying upon this decision of this court we insist that Manchester was estopped from denying her ownership. See also 4 Cush., 307.

III. Should the court have granted the instructions asked for by the defendant? The first instruction was properly refused because the court had already

UPON THE FACTS AGREED

decided that the place where the accident occurred was a public street of Manchester, (see record, p. 7.) That decided that question, and therefore the court properly refused to reopen the question for the purpose of letting the jury decide it. The province of the court, where the facts are agreed, or undisputed, is clearly defined in Oscanyan vs. Arms. Co., 13 Otto, 261, 265 and 266.

But again. The instruction was properly refused, because, as shown above, in replying to the second bill of exceptions, it was not necessary for the highway to have been a street of Manchester. As shown above, the city was rightly held liable whether it was a street of the city or not. Hence the instruction was not comprehensive enough. The jury ought not to have found for the defendant even had they believed the supposition stated in the instruction. We submit that this instruction was properly refused, and also the second, third and seventh instructions for the same objections.

Nor was error committed in the rejection of the fourth instruction. There was no evidence offered tending to show even a probability of the plaintiff's having wandered from the street. This is seen from the fact that the instruction locates no point to which the plaintiff may have wandered, and from which he may have fallen. The instruction is too indefinite. The jury were asked to locate the place of accident at a point different from that alleged in the declaration; but the defendant declined to assist the jury even with an attempt to specify some other place. The jury were left to locate the place of accident, at any point they saw fit, provided they did not determine upon a point that would render Manchester liable for damages. The court very properly refused to give this liberal offer of the defendant to the imaginations of the jurors. The fourth bill of exceptions shows, that some of the testimony on this point before the jury only went to suggest that he might have "by possibility have wandered from the highway." Of course upon such shadowy evidence no instruction could have been based.

"It is not the duty of the court to instruct, where the instruction demanded assumes a theory of fact, which is unsupported or contradicted by the evidence. On the contrary it is error to do so; and the jury should be distinctly told that the requisite evidence is wanting." Indianapolis &c. R. R. vs. Horst, 3 Otto p. 299.

But the court in the instructions it gave allowed the defendant all the benefit it could derive or be entitled to from such evidence of "possibility." It told the jury that they might find for the plaintiff if they should believe among other things, "from the evidence that a proper guard or protection *to the highway* was not provided." This

language, taken in connection with the rest of the court's instruction, only tells the jury that they cannot find for the plaintiff, unless they believe that the accident occurred on account of the absence of a proper guard at the alleged point on the highway. Surely if the plaintiff when hurt was not on the highway, the accident could not have occurred on account of the absence of a proper guard to said highway alleged. Thus the court gave the defendant the benefit of testimony alluded to.

The fifth, sixth, eighth, ninth and tenth instructions all involve the doctrine of contributory negligence. The difference between them is one rather of verbiage than substance.

It is sufficient answer to any objection, made on account of their being refused, that the court in the instruction it gave clearly and correctly announced that doctrine as far as applicable to this case. Its instruction is in accordance with the case of Railroad Company vs. Gladman, 15 Wal. 401 and Indianapolis R. R. Co. vs. Horst, 3 Otto 298. See also Richmond & Dan. R. R. Co. vs. Morris, 31 Grat. 203, and R. & Dan. R. R. Co. vs. Anderson, &c., 31 Grat. 814.

We have attempted the above to show as to each instruction asked for by the defendant, that the court rightly rejected it. But there is a general answer that we think is sufficient in itself. It is that "When instructions are asked in the aggregate, and there is anything exceptionable in either of them, the court may properly reject the whole." Indianapolis, &c., R. R. Co. vs Horst, 3 Otto 291.

The instructions of the defendant were asked for as a whole, and as many, if not all of them are open to objection, this court will overrule the exception to the lower court's refusal.

IV. The fourth bill of exceptions has already been noticed in replying to the objection of the defendant that the fourth instruction was not given. The fourth bill is in truth but a repetition of that objection.

V. The fifth bill consists of an objection to the court below giving the charge it did. We cannot think of any grounds for this objection, unless it be those already noticed in replying to the 3d bill. We will not repeat our reply. We will only refer to the following authority:

In Railroad Company vs. Hanning, 15 Wal. 149 it was held that, this court cannot decide that a charge is wrong, which submits to the jury to say whether a wharf was a public place upon which all persons were accustomed to come and go at pleasure, and were by law permitted so to do, when the record does not contain the evidence upon which the question arose. *The court cannot assume that the charge was* erroneous." See also Fitzhugh vs. Fitzhugh, 11 Grat. 300.

This bill of exceptions does not as was suggested in Lincoln vs. Chalflin, 7 Wal. 132–136, contain "such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issue involved." There is nothing in this bill to enable this court to determine whether the ruling of the lower court was wrong or not. This court will not refer or look at another bill of exceptions to supply such an omission. Brooke vs. Young, 3 Rand. 106. Hence this objection must be overruled.

VI. The sixth and lsst bill of exceptions was to the court's refusing a new trial. It is needless to discuss the question whether the court should have granted a new trial. Whether the court below rightly or wrongly refused a new trial, is not a subject of review in this court. See Indianapolis, &c, R. R. Co., vs. Horst, 3 Otto 301, and Railway Co. vs. Heck, 12 Otto 120.

We have answered all the objections raised by the appellant in the court below. If the counsel have now other objections we are not aware of them. The brief for the city has not yet been printed, so far as we are aware.

We ask that the judgment of the lower court be affirmed.

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G. K. MACON,
for ERICCSON.